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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 226.

WALLACE P. COOK AND WILLARD P. COOK, PLAINTIFFS IN ERROR,

vs.

CHARLES A. STREET, W. B. CHATFIELD, AND F. A. KEEP.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED APRIL 20, 1893.

(15,297.)

THE LAW ASSOCIATION —OF— PHILADELPHIA.

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1 Circuit Court of the United States for the Eastern District of Wisconsin.

UNITED STATES OF AMERICA, *Eastern District of Wisconsin*, } ss:

At a stated term of the circuit court of the United States for the eastern district of Wisconsin, begun and held, according to law, at the city of Milwaukee, in said district, on the first Monday (being the sixth day) of October, A. D. 1890—present, the Hon. Walter Q. Gresham, circuit judge, presiding—among other the following proceedings were had, to wit:

CHARLES A. STREET, W. B. CHATFIELD, & F. A. KEEP
vs.
WALLACE P. COOK & WILLARD P. COOK. } At Law.

Be it remembered that heretofore, to wit, on the 8th day of March, A. D. 1890, came the above-named plaintiffs, by their attorneys, Messrs. Winkler, Flanders, Smith, Bottum & Vilas, and filed their præcipe for a summons against the above-named defendants, together with their complaint to be served and bond for costs approved by the clerk; which præcipe is as follows:

Præcipe for Summons.

Circuit Court of the United States for the Eastern District of Wisconsin.

CHARLES A. STREET, W. B. CHATFIELD, & F. A. KEEP
vs.
WALLACE P. COOK & WILLARD P. COOK.

Issue a summons in the above-entitled cause. Complaint served.

WINKLER, FLANDERS,
SMITH, BOTTUM & VILAS,
Plaintiffs' Attorneys.

To Edward Kurtz, clerk.

Whereupon a summons issued, with said complaint annexed, as follows:

2 *Summons.*

Circuit Court of the United States for the Eastern District of Wisconsin.

CHARLES A. STREET, W. B. CHATFIELD, & F. A. KEEP, Plaintiffs,
vs.
WALLACE P. COOK & WILLARD P. COOK, Defendants.

[SEAL.] The President of the United States of America to the said defendants:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend

the above-entitled action in the court aforesaid, and in case of your failure so to do judgment will be rendered against you according to the demand of the complaint a copy of which is herewith served upon you.

The marshal of said district is hereby commanded to serve this summons and make due return thereto.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the eastern district of Wisconsin, this 8th day of March, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the 114th.

EDWARD KURTZ, *Clerk.*

WINKLER, FLANDERS,
SMITH, BOTTUM & VILAS,
Plaintiffs' Attorneys.

P. O. address, Milwaukee, Wis.

Service of within summons & complaint admitted & we appear for the defendants in the action.

Dated March 10th, 1890.

WEBSTER & WHEELER,
Att'ys for Defendants.

3 *Complaint.*

Circuit Court of the United States for the Eastern District of Wisconsin.

CHARLES A. STREET, W. B. CHATFIELD, and F. A. KEEP, Plaintiffs,
vs.
WALLACE P. COOK and WILLARD P. COOK, Defendants.

The above-named plaintiffs bring this their complaint against the above-named defendants and allege:

First. That said plaintiffs are citizens of the State of Illinois and each of them is a citizen of the State of Illinois, and that said defendants are citizens of the State of Wisconsin and each of them is a citizen of the State of Wisconsin.

Second. That at the time of the making of the contract hereinafter mentioned said plaintiffs were partners under the firm name and style of Street, Chatfield & Company, doing business at Chicago, Illinois, and said defendants were partners under the firm name and style of W. P. Cook & Brother, doing business at Oconto, in the State of Wisconsin; that on or about the 9th day of July, 1887, said parties entered into a contract, of which a copy, marked Exhibit A, is hereto annexed; that upon the making of said contract these plaintiffs made and delivered to said defendants, in pursuance

4 of the terms thereof, their promissory notes as therein provided, dated the 9th day of July, 1887, to wit, one for $15,000.00, payable ninety days after date, with interest at six per

cent. per annum; one for $10,000.00, payable August 12, 1887; one for $10,000.00, due October 12, 1887; one for $10,000.00, due November 12, 1887, and one for $8,367.47, due June 1st, 1888, with interest at the rate of six per cent. per annum from the 12th day of November, 1887, all of which notes were afterwards fully paid by these plaintiffs; that said defendants from time to time delivered to these plaintiffs logs under said contract at the Menominee River Manufacturing Company's booms, which logs were, in accordance with said contract, scaled by the Doyle scale rule in the mill where the same were sawed by a good and competent scaler, to wit, Albert B. Lawton, in said contract named, and proper reports of such scaling were furnished to said parties as provided in said contract; that by the close of the sawing season of 1889 4,851,580 feet of said logs had not been delivered by said defendants or received by these plaintiffs, and that the total number of logs delivered by the defendants and received by the plaintiffs under said contract by the close of said sawing season amounted only to 3,633,890 feet of logs, Doyle scale, and that that was the total amount thereof as scaled at the mill where the same were sawed in accordance with said contract; that a portion of said logs when delivered at said Menominee River Manufacturing Company's booms were subject to back toll and river charges amounting to $178.70, which ought to have been paid by said defendants and which these plaintiffs were obliged to pay in order to obtain said logs, and did pay on the 31st of October, 1888, and that these plaintiffs paid for scaler's wages provided in said contract the sum of $128.84, of which said defendants under and by said contract are required to pay one-half.

That the total payments made by these plaintiffs to and for said defendants under said contract, in addition to interest, amount to $53,610.59; that the said logs received by these plaintiffs as aforesaid at the contract price of $11.00 per thousand amount to $39,972.78; that in addition thereto these plaintiffs have received from the stray-log committee on account of 22,069 feet of stray logs the sum of $173.37, making total credits to said defendants under said contract $40,146.15, leaving said defendants indebted to these plaintiffs in the sum of $13,464.44 besides interest; that these plaintiffs on the 6th day of February, 1890, demanded the same of the defendants, who refused to pay the same, and have not paid the same or any part thereof; that the sawing season of 1889 closed on or about the first of November, 1889.

Wherefore the plaintiffs demand judgment against said defendants for the sum of thirteen thousand four hundred and sixty-four dollars and forty-four cents ($13,464.44), with interest from the first of November, 1889, and the costs of this action.

WINKLER, FLANDERS,
SMITH, BOTTUM & VILAS,
Plaintiffs' Attorneys.

STATE OF ILLINOIS, } ss:
County of Cook, }

Charles A. Street, being first duly sworn, on oath deposes and says that he is one of the plaintiffs in the above-entitled action, and makes this affidavit of verification for and in behalf of him-
6 self and his coplaintiffs, and is acquainted with the facts stated in said complaint; that he has read the foregoing complaint and knows the contents thereof, and that the same is true to his own knowledge except as to those matters therein stated on his information and belief, and as to those matters he verily believes it to be true.

CHARLES A. STREET.

Subscribed and sworn to before me this seventh day of March, 1890.

[SEAL.] WM. D. C. STREET,
Notary Public, Cook County, Illinois.

"EXHIBIT A."

Memorandum of agreement made and entered into this 9th day of July, A. D. 1887, by and between Street, Chatfield and Co. (comprised of C. A. Street, W. B. Chatfield, & F. A. Keep), of Chicago, Illinois, party of the first part, and Cook Brothers (comprised of Wallace P. Cook and Willard P. Cook), of Oconto, Wisconsin, party of the second part.

Said second party agrees to sell and said first party agrees to buy, as herein provided, all the merchantable pine saw-logs cut from the following descriptions of lands. The logs having for end mark "C. O." and bark mark , cut and put into the Paint river from:

N. W. of S. W. of section 2, town. 44, range 36, west.
N. W. " S. W. " 24, " " " " "
S. W. " N. W. " 26, " " " " "
S. E. of N. E. of section 35, town. 44, range 36, west.
7 S. ½ " N. W. " " 36, " " " " "
S. W. ¼ of " 36, " " " " "
W. ½ of S. E. of section 36, town. 44, range 36, west.
S. W. " S. E. " 1, " 43, " " "
S. E. " N. W. " 1, " " " " "

The logs having for end mark and bark mark put into the Brule river, Wisconsin, and cut from part of section six (6), town. 40 range 15, and part of sections 1 & 12, town. 40, range 14.

The logs having for end mark "C. T. P." and bark mark "T. Y." which were put in by C. T. Pendleton and now afloat in the Menominee river.

The wood scale of these three lots of logs, which for the purpose of this contract, is taken as the basis for advance payments, as per scale made in the woods, is as follows: The logs marked C. O., per

wood scale, amount to 4,337,235 feet (of this lot 300,019 feet, log scale, has been sold and delivered prior to the date of this contract.) The logs marked T per wood scale, amount to 856,668 feet. The logs marked C. T. P., per wood scale, amounts to 442,863 feet.

Said second party agrees to deliver the logs hereinbefore described at the Menominee River Manufacturing Company's boom, in the Menominee river, above the dividing piers, free from any and all liens or charges whatsoever, and to pay any storage charges now or that may become due before the execution of this contract, for any of said logs; said first party to pay all other charges due or to become due.

All of the logs so delivered, as herein provided, shall be scaled by Doyle scale rule in the mill where sawed by a good and
8 competent scaler (Albert B. Lawton, who is now scaling at Ludington, Wells & Van Schaick's river mill, at Menominee, is to scale the logs so long as he scales fairly), who shall make proper allowances for shakes, rot and other defects that will render the lumber product unmerchantable. If either of the parties to this contract shall at any time deem the scale as made by the scaler under the scaling instructions herein unfair, or improper, upon good reason of such unfair, or improper scaling, a new man may be selected, who shall be agreeable to the parties hereto, who shall scale said logs so long as he scales fairly. In case any disagreement shall arise as to the fairness of any scaler's scale, and the parties hereto are unable to settle the same, then three disinterested persons shall be chosen at once and without delay, one by each party hereto, the two to choose the third, who shall decide as to such fair scaling; this contract to be taken as the basis for such test as to said scale.

Said second party agrees to assign and transfer, and hereby does assign and transfer to said first party the log marks used in marking the above-described logs.

Said second party agrees that there shall not be to exceed 20,000 feet of Norway or spruce logs in the entire lot of logs sold under this contract to the said first party.

In consideration of the faithful performance by said second party of their part of this agreement, said first party agrees to receive and pay for said logs so delivered and scaled as hereinbefore provided the sum of eleven ($11) dollars per thousand feet, log scale, and to make such payments from time to time as hereinafter provided. Upon the execution of this contract, to pay the sum of fifteen thousand ($15,000.00) dollars, by giving their note for this amount, payable ninety days after date with interest at 6%
9 per annum; to give their note for ten thousand ($10,000.00) dollars, due August 12, 1887; further to give their note for ten thousand ($10,000.00) dollars, due October 12, 1887; further to give their note for ten thousand ($10,000.00) dollars, due November 12, 1887 (these last three notes made without interest); and further to give their note for eighty-three hundred and sixty-seven & $\frac{47}{100}$ dollars ($8,367.47) due June 1st, 1888, to draw interest from November 12th, 1887, at the rate of 6% per annum. This settle-

ment when made being at the rate of ten ($10) dollars per thousand feet, based on the wood scale.

After 4,851,580 feet of logs have been received and scaled as hereinbefore provided (said amount cancelling the amount of the notes hereinbefore described), the logs thereafter delivered and scaled shall be paid for by said first party at the rate of eleven ($11.00) dollars per thousand feet, per said log scale, once in thirty days, until all logs sold under this contract are delivered.

If at the close of the sawing season of 1889, 4,851,580 feet of said logs have not been received, which amount figured at the rate of eleven ($11.00) dollars per thousand feet, is necessary to cancel the payments made by said first party, the said second party shall upon demand, pay back to said first party such overpayment. Said first party agrees, however, that in case such back payment is made by said second party, that they will accept during the sawing season of 1890, any logs that may be delivered under the terms of this contract, and pay for the same at the rate of eleven ($11.00) dollars per thousand feet, log scale, as fast as delivered; such undelivered logs, however, to be and remain the property of said second party after such back payment until delivered as above stated.

10 It is mutually agreed that said first party shall attend to the delivery of the logs by the boom company to the mill where sawed, without expense to said second party.

The scaler who scales the logs in the mill shall furnish weekly reports of all logs scaled to the parties hereto, and a daily report shall be furnished by said scaler to said second party if said second party requires it.

It is mutually agreed that the wages of the scaler or scalers shall be paid by the parties hereto, each paying one-half.

It is mutually agreed that the covenants and agreements herein contained shall be binding upon the heirs, administrators and assigns of the respective parties hereto.

In witness whereof, the parties hereto have executed this instrument, this 12th day of July, 1887.

In duplicate.

STREET, CHATFIELD & CO. [SEAL.]
W. P. COOK & BRO. [SEAL.]

May 31, 1890.—This day came the defendants, by their attorneys, Messrs. Webster & Wheeler, and filed their answer as follows:

11 *Answer.*

Circuit Court of the United States for the Eastern District of Wis.

CHARLES A. STREET, W. B. CHATFIELD, and F. A. KEEP, Plaintiffs,
vs.
WALLACE P. COOK and WILLARD P. COOK, Defendants.

Answering the plaintiffs' complaint herein, the defendants—

1st. Admit the citizenship, the partnership character of the parties, the making of the contract set forth in the complaint, the making

and delivery by the plaintiff of the notes called for by the contract, their payment, the delivery of logs from time to time under said contract, all as set forth in said complaint. They allege that no other allegation of the complaint is true.

2nd. They allege that at once upon the execution of said contract the defendants began the delivery, Albert B. Lawton, named in said contract, the scale in the mill, and the plaintiffs the sawing of said logs; that defendants soon became convinced that the said Lawton was not making a fair or proper scale of said logs and they at once put a disinterested scaler of good repute, viz., one C. J. Messenett, in the mill to scale the logs at the side of said Lawton; that each used the Doyle scale rule and made daily reports of their respective scales of the same logs to the defendants, which showed so great a difference in the quantity of lumber contained in the logs so scaled by them that after they had scaled five days or more together, and every day's scale report showed the said Law-
12 ton's scale of the quantity to be very greatly less than the said Messenett's of the same logs, the defendants, on the 20th day of September, 1887, caused the plaintiffs to be served with a written or printed notice, of which the following is a copy, to wit:

"OCONTO, WIS., *Sept. 9th*, 1887.

Messrs. Street, Chatfield & Co.

GENTLEMEN: Take notice that I deem the scale now being made and heretofore made by Albert B. Lawton of the logs sold you by me by contract dated July 12th, 1887, unfair and improper, and require that you join me in the selection of a new man to carry on the scaling of those logs in the manner provided by said contract.

W. P. COOK,
By WEBSTER & WHEELER, *His Att'ys.*"

That said notice related to the logs and none other described in said contract, "Exhibit A," and was given and made for and on behalf of the defendants.

That the plaintiffs replied to said notice Sept. 27th, 1887, by letter, of which the following is a copy:

"CHICAGO, *Sept. 27th*, 1887.

Messrs. W. P. Cook & Bro., Oconto, Wis.

GENTLEMEN: Your communication of September 9th was received by Mr. Nathan Pierce at Marinette, Wisconsin, on the 23rd day of September, between one and two o'clock p. m., and by him mailed to us here.

We refuse to join you as therein requested in the selection of a new scaler, for the reason that Albert B. Lawton, who is and has been scaling the logs in accordance with the contract, is scaling fairly, of which fact we have full evidence and proof. Until you can prove under the contract of July 12th, 1887, that Albert B. Lawton's scaling is unfair and improper he will continue to scale the logs as heretofore.

STREET, CHATFIELD & CO."

13 That the Nathan Pierce mentioned in said letter was the agent of the plaintiffs in charge of the sawing of said logs.

That the plaintiffs, against the wish and constant protest of the defendants, thereafter retained the said Lawton at the labor of scaling said logs and always refused to recognize any right in defendants to have the mill scale of said logs made by any other scaler; that prior to the commencement of this action defendants delivered to the plaintiffs at the Menominee River Manufacturing Company's booms above the dividing piers in the Menominee river mentioned in said contract logs under said contract which, taken to the mill and fairly and honestly scaled by the Doyle rule, would have scaled over five million feet of merchantable lumber after making proper allowances for shakes, rot, and other defects; that a great many of the logs so delivered were, through the carelessness and negligence of the plaintiffs, lost in transit from the dividing piers to the mill where sawed, and many more were—and this the defendants allege upon information and belief—sawed without being scaled at all at the mill where sawed, and those sawed were unfairly and improperly scaled by the said Lawton, in this, that instead of making proper allowances for shakes, rot, and other defects that would render the lumber product unmerchantable he constantly made allowances for such defects grossly in excess of such as would fairly and honestly have been proper.

For a second defense to the cause of action stated in the complaint and for a counter-claim thereto the defendants allege
14 that while negotiations were pending for the sale of the logs above mentioned to the plaintiffs and while the terms of such sale were being arranged the plaintiffs represented and stated to the defendants that Alfred B. Lawton, named in said contract, was and the plaintiffs then and there held out the said Albert B. Lawton as a fair, honest, competent, and disinterested person to scale said logs in the mill, and represented and stated to the defendants that the said Albert B. Lawton would, if selected to scale the logs in the mill, scale them fairly and honestly and according to a course of fair dealing between the parties; that, relying upon such representations and statements of the plaintiffs in that behalf, the defendants, at the special instance and request of the plaintiffs, consented to the incorporation in said contract of the clause naming the said Lawton as the one to make the scale of said logs in the mill; that each and every one of said representations were, when made, false and untrue and were known by the plaintiffs to be so when they made them; that the said Lawton was at the time such representations were made neither a fair, honest, competent, or disinterested person to scale said logs. On the contrary, he was then and has ever since remained the corrupt and pliant tool of the plaintiffs, always ready, in consideration of the employment obtained for him by the plaintiffs in the character of scaler, to observe their wishes and follow their suggestions in any course by which the interests of the plaintiffs would be aggrandized; that the plaintiffs well knew when they made the representations and statements to the defendants above set forth regarding the said Lawton that if he was per-

mitted or chosen to scale said logs in the mill that he would
15 make a fraudulent scale thereof in the interest of the plaintiffs, and would by his scale thereof afford the plaintiffs a means for recovering from the defendants, as an overpayment upon said logs, a large sum of money and enable them to obtain said logs for a sum greatly less than they should honestly bring the defendants according to the terms of said contract, and these defendants charge the fact to be that the plaintiffs and the said Lawton, at the time the said plaintiffs made the representations and statements hereinbefore set forth regarding said Lawton to these defendants, well understood each other to the effect that if the said plaintiffs succeeded in securing the said Lawton the employment as scaler of said logs at the mill that he would report such a scale thereof as would enable the plaintiffs to cheat and defraud these defendants under said contract out of a large sum of money by making a fraudulent case for the recovery of a large amount of money from the defendants by the plaintiffs as an alleged overpayment upon said logs; none of which facts were known to or suspected by these defendants at the time said representations and statements and said contract were made.

That soon after the plaintiffs commenced sawing said logs in the mill the said Lawton, carrying out the understanding between himself and the plaintiffs in that behalf as hereinbefore stated, began making an unfair, dishonest, and fraudulent scale of the logs as they came into the mill, which he did by intentionally and wilfully making allowances or deductions in quantity from the logs scaled for defects or alleged defects therein greatly in excess of what
16 such allowances and deductions would by a fair and honest scale have been.

That as soon as the defendants discovered that the said Lawton was making such an unfair and dishonest scale of said logs they at once put a fair, honest, competent, and disinterested scaler, viz., C. J. Messenett, in the mill where said logs were being sawed to scale said logs at the side of said Lawton; that the said Massenett and Lawton both used the Doyle rule and scaled the same logs therewith and made daily reports of their respective scales of the same logs to the defendants, which showed so great a difference in the quantity of lumber contained in the logs so scaled by them that, after they had scaled five days or more together and every day's scale report showed the said Lawton's scale of the quantity to be very greatly less than the said Messenett's scale of the same logs, the defendants, on the 20th day of September, 1887, caused the plaintiffs to be served with the written or printed notice of date September 9th, 1887, hereinbefore set forth, which is here referred to and made a part hereof; that said notice related to the logs, and none other, described in said contract "Exhibit A," and was given and made for and on behalf of the defendants; that the plaintiffs replied to said notice September 27th, 1887, by letter bearing that date, a copy of which is hereinbefore set forth, which is here referred to and made a part hereof; that the Nathan Pierce mentioned in said letter was the agent of the plaintiffs in charge of the sawing of

said logs at that time; that the plaintiffs, after their said letter to the defendants of date September 27th, 1887, carrying out their dishonest and fraudulent purpose to cheat and defraud these defendants with the aid and assistance of said Lawton, at all times
17 refused to recognize any right of these defendants to a change of scaler to make the scale of said logs in the mill, and, against the constant protest and objection of these defendants, retained the said Lawton at the labor of scaling the said logs in the mill, and these defendants charge the fact to be that the said Lawton, with the knowledge and at the instance of the plaintiffs, intentionally and wilfully continued until the close of the sawing season of 1889 to make an unfair and dishonest scale of said logs by making allowances and deductions for defects or alleged defects therein greatly in excess of such as were proper or as would have been made if a fair and honest scale was being made of said logs.

And the defendants further charge the fact to be upon information and belief that the said Lawton, at the special instance and request and in pursuit of the design and purpose existing between the plaintiffs and himself to cheat and defraud these defendants while scaling said logs at the mill where they were being sawed, allowed a great many of said logs, the number of which or the quantity of lumber contained therein the defendants are unable to state, to pass into and through said mill and the process of manufacture into lumber without making or reporting any scale thereof whatever and continued so to do throughout the entire period during which said logs were being manufactured into lumber up to the close of the sawing season of 1889; and these defendants further allege that the plaintiffs, still pursuing their purpose to cheat and defraud these defendants and to make a case for the recovery from them of a large sum of money by bringing about an apparent shortage in the quantity of logs run into the mill where they
18 were being sawed, carelessly, wilfully, and intentionally allowed a large quantity of said logs, but what quantity the defendants are now unable to state, to escape from them in transit between the dividing piers where they received said logs from the boom company and the mill where they were sawed.

And the defendants allege that by reason of the dishonest and fraudulent acts of the said Lawton and of the plaintiffs hereinbefore set forth the said Lawton's scale of the logs sawed up to the close of the sawing season of 1889 showed a great dificiency in quantity from the amount actually delivered to the plaintiffs by the defendants under said contract; that the defendants prior to the close of the sawing season of 1889 delivered to the plaintiffs at the Menominee River Manufacturing Company's booms above the dividing piers in the Menominee river logs under said contract which, taken to the mill and fairly and honestly scaled by the Doyle rule, would have scaled 5,000,000 feet of merchantable lumber, after making proper deductions for shakes, rot, and other defects, for which the plaintiffs would have been liable to pay these defendants under said contract at the close of said season, in addition to the sums theretofore paid by the plaintiffs on said contract, the sum of $1,389.41,

no part of which sum has been paid, for which sum, with interest thereon from the first day of November, 1889, the defendants demand judgment against the plaintiffs, besides the costs and disbursements of this action.

WEBSTER & WHEELER,
Att'ys for Def'ts.

19 STATE OF WISCONSIN, } ss:
County of Oconto, }

Wallace P. Cook, being first duly sworn, deposes and says that he is one of the defendants in the above-entitled action, and makes this affidavit of verification for and on behalf of himself and his co-defendant, and is acquainted with the facts stated in the foregoing answer; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated on his information and belief, and as to those matters he believes it to be true.

WALLACE P. COOK.

Subscribed and sworn to before me this 24th day of May, A. D. 1890.

GEO. BEYER,
Notary Public, Oconto Co., Wisconsin.

June 10, 1890.—This day came the plaintiffs, by their attorneys, and filed their reply as follows:

Reply.

Circuit Court of the United States for the Eastern District of Wisconsin.

CHARLES A. STREET *et al.*, Plaintiffs,
against
WALLACE P. COOK and WILLARD P. COOK, Defendants.

The plaintiffs in the above-entitled action, replying to the alleged counter-claim contained in the defendants' answer therein, admit that at the time of the making of the contract therein and in the complaint in this action referred to they stated that they believed Albert P. Lawton, in said contract mentioned, to be an honest, competent, and disinterested scaler.

These plaintiffs also admit that while the said sawing
20 was being done said defendants for a few days caused one Messenett to scale or pretend to scale the logs at the mill, and that said Messenett did scale or pretend to scale the same. They also admit that the correspondence set out in said answer took place between the parties, and admit that Nathan Pierce was the agent of these plaintiffs. They also admit that all the facts alleged in the plaintiffs' complaint in this action which refer to the same transaction referred to in said pretended counter-claim are true.

Except as hereinbefore admitted, these plaintiffs deny each and every allegation in said counter-claim contained.

WINKLER, FLANDERS,
SMITH, BOTTUM, & VILAS,
Plaintiffs' Attorneys.

STATE OF ILLINOIS, } ss:
County of Cook, }

Charles A. Street, being duly sworn, says that he is one of the plaintiffs in this action and makes this affidavit in their behalf; that he is acquainted with the case, and that the foregoing reply is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

CHARLES A. STREET.

Subscribed and sworn to before me this 29 day of May, A. D. 1890.

[SEAL.] W. D. C. STREET,
Notary Public, Cook County, Illinois.

21 And now, at this term, to wit, October term, A. D. 1890, and on the twenty-second day thereof, to wit, on the 5th day of November, A. D. 1890, the following proceedings were had, to wit:

Trial.

CHARLES A. STREET, W. B. CHATFIELD, & F. A. KEEP } At Law.
vs.
WALLACE P. COOK & WILLARD P. COOK. }

This day came the parties, by their counsel, Messrs. F. C. Winkler and E. H. Bottum appearing for the plaintiffs, and Mr. W. H. Webster for the defendants, and the issue herein came on to be tried. Whereupon a jury was called to try the same, who came, to wit, P. J. Klein, Nathaniel Carswell, Mark Lovel, Henry H. Ludwig, Seth H. Hollister, F. B. Huchting, E. R. Blake, C. C. Gaylord, J. E. Reynolds, Charles Streddy, C. A. Pettibone, and L. N. Roddy, twelve free, honest, and lawful men of the district, who were severally sworn and empannelled, and, the trial not being concluded, the same was adjourned until tomorrow morning.

November 6, 1890.—This day came the parties, by their counsel, and also the jurors of the jury, and the trial of the issues herein was resumed, and, not being concluded, the same was adjourned until tomorrow morning.

November 7, 1890.—This day came the parties, by their counsel, and also the jurors of the jury, and the trial of the issues herein was resumed, and the jurors of the jury aforesaid, being charged by the court, retired to their room under the charge of a sworn officer to deliberate upon their verdict and with leave to bring in a sealed verdict tomorrow morning.

22 And afterwards, to wit, on the 25th day of said term, to wit, on the 8th day of November, A. D. 1890, the following proceedings were had, to wit:

Verdict.

CHARLES A. STREET, W. B. CHATFIELD, & F. A. KEEP
vs.
WALLACE P. COOK & WILLARD P. COOK. } At Law.

This day came the parties, by their counsel, and the jurors of the jury aforesaid came into court with a sealed verdict, and on their said oaths respectively do say that they find the issue herein in favor of the plaintiffs and assess the damages to the said plaintiffs at the sum of five thousand nine hundred and thirty-four dollars and eighty-eight cents; and came the plaintiffs, by their counsel, and moved the court for a new trial for reasons filed as follows:

Plaintiffs' Motion for New Trial.

Circuit Court of the United States for the Eastern District of Wisconsin.

CHARLES A. STREET & Others
against
WALLACE P. COOK & WILLARD P. COOK.

And now come the plaintiffs and move the court to set aside the verdict and grant a new trial in the above cause for the reason that the verdict is not supported by the evidence and is contrary to the law of the case.

WINKLER, FLANDERS,
SMITH, BOTTUM & VILAS,
Att'ys for Pl'ffs.

23 And came the defendants, by their counsel, and moved the court for a new trial for reasons filed as follows:

Defendants' Motion for New Trial.

United States Circuit Court, Eastern District of Wisconsin.

CHARLES A. STREET *et al.*
vs.
WALLACE P. COOK *et al.* } At the October, 1890, Term of said Court, Hon. Walter Q. Gresham, Judge, Presiding.

Now come the defendants into court and make a motion for a new trial upon the following grounds, for errors committed by the court as follows:

1st. In excluding the testimony offered by the defendants in the particulars where the rulings of the court excluding such testimony were excepted to by the defendants at the trial.

2nd. In its construction of the contract sued on herein in the particulars with reference to which exceptions were taken by the defendants at the trial to the expressions of the court declaring such erroneous construction.

3rd. In its construction of the law of fraud in such case with reference to which exceptions were taken by the defendants at the trial to the expressions of the court declaring such erroneous construction.

4th. In that part of its charge to the jury wherein the same erroneous construction of the said contract and of the law of fraud in such cases was repeated.

WEBSTER & WHEELER,
Def'ts' Att'ys.

24 And the said motions for a new trial came on to be heard, when the plaintiffs withdrew their said motion, and, the defendants' motion being submitted, it is ordered by the court that the same be and is hereby overruled.

Judgment.

Whereupon it is considered and adjudged by this court now here that the said plaintiffs do have and recover of the said defendants, Wallace P. Cook and Willard P. Cook, the sum of five thousand nine hundred and thirty-four dollars and eighty-eight cents damages so as aforesaid assessed by the jury, together with one hundred and sixty-four dollars and seventy cents, their costs about their said suit in this behalf by them expended, and that they have execution therefor.

Judgment-roll filed November 8th, A. D. 1890.

EDWARD KURTZ, *Clerk.*

Damages	$5,934 88
Costs	164 70
	$6,099 58

And same day bill of exceptions signed and filed as follows:

Bill of Exceptions.

Circuit Court of the United States for the Eastern District of Wisconsin.

CHARLES A. STREET, W. B. CHATFIELD, and F. A. KEEP, Plaintiffs,
vs.
WALLACE P. COOK and WILLARD P. COOK, Defendants.

And thereafter said cause came on for trial at the October term of said court, before the Hon. Walter Q. Gresham, circuit judge, and a jury duly empaneled and sworn therein, Messrs. Winkler,
25 Flanders, Smith, Bottum & Vilas appearing for the plaintiffs, and W. H. Webster for the defendants; and thereupon, to

maintain the issues on their part, the plaintiffs called and had sworn as a witness in their behalf therein ALBERT B. LAWTON, the person of that name mentioned and referred to in the contract sued on in this action, and proved by him that he scaled with the Doyle rule of the logs mentioned in the complaint purchased by the plaintiffs of the defendants that were sawed after such purchase and up to the close of the sawing season of 1889 at the mill where the same were sawed 16,273 pieces of logs, and that the logs so scaled by him contained 3,633,890 feet, and in 1890, prior to the commencement of this action, 81 additional logs, which contained 19,575 feet, and that in making such scale he made proper allowances for shakes, rot, and other defects in the logs that would render the lumber product thereof unmerchantable.

CHARLES A. STREET, one of the plaintiffs, was then produced and sworn as a witness for the plaintiffs, and the plaintiffs proved by him that the scaler's wages for scaling the logs in the mill where they were sawed amounted to one hundred and twenty-eight and $\frac{84}{100}$ dollars ($128 84), and that they had paid the whole amount thereof.

It was then admitted by the defendants that a portion of said logs when delivered at the Menominee River Manufacturing Company's booms were subject to back toll and river charges amounting to one hundred and seventy-eight and $\frac{70}{100}$ dollars ($178.70), which ought to have been paid by said defendants, and that the plaintiffs were obliged to pay the same in order to obtain said logs, and which they did pay on the 31st day of October, 1888, in order to get said logs.

Thereupon the plaintiffs rested their case.

26 Thereupon WALLACE P. COOK, one of the defendants, was produced and sworn as a witness in behalf of said defendants, and among other things testified as follows:

(Examined by Mr. WEBSTER:)

Q. Are you one of the defendants in this action?

A. Yes, sir.

Q. Do you know Mr. Lawton, the witness who has been on the stand?

A. I knew him by sight and have spoken to him a few times.

Q. What do you know of Mr. Lawton's scaling of these logs that was of an unfair and improper character, and how did you ascertain it and what steps did you take upon learning it?

To this question the plaintiffs, by their counsel, objected, claiming that the question should be subdivided.

By the COURT: Ask him to state to the jury what he knows to support that charge. You may state what you know, Mr. Cook, of unfair scaling on the part of this man.

A. Do you want me to tell the first reason for which I went
the mill to investigate the scaling?
Q. Yes.
A. He used to furnish us a report each night of each day aft
the scale was made, a daily report, and we saw by his report——
Q. What do you know, if anything, of anything unfair and in
proper in Lawton's scaling of these logs after he commenced scalin
and how did you learn it and what steps did you take after it?
A. One thing, he takes more logs to the thousand feet than th
wood-scaler's report shows, and another thing——
By the COURT: How is that?
A. His scale report shows that he takes 4.2 logs per thousand o
the first day's scaling, and on the second day's scaling 4.76 logs t
the thousand; the third day, 4.53 of the "C. O." logs. A
27 cording to the wood scale he should take about 3.38 logs t
the thousand of the "C. O." logs. The other marks fall sho
equally as much. The woods scale of the "C. O." logs showed 3 an
nearly $\frac{38}{100}$ of a log, on the TT logs about 2.70, and of the "C. T. P.
logs about 2 logs to the thousand. On the first day's scaling, Jul
22nd, Lawton reported of the "C. O." logs scaled 489 logs, makin
113,936 feet; of the inverted T one log, 225 feet; of the "C. T. P.
log 196 feet, and on July 23rd 444 of the "C. O." logs, 98,086 feet
24 of the inverted T logs, 8,201 feet, and of the "C. T. P." logs 3
logs, 12,924. July 25th he reported 287 of the "C. O." logs at 60,23
feet, 13 of the inverted T logs at 4,258 feet, 13 of the "C. T. P." logs
3,513 feet. For the July report —. The first day's report it too
of the "C. O." 4.3 nearly for a thousand feet, of the inverted T log
4.44, and of the "C. T. P." logs 5.1; July 23rd of the "C. O." log
he took 4.53 to the thousand, of the inverted T 2.93, and of th
"C. T. P." logs 2.32; July 25th, of the "C. O." logs 4.76, and of th
inverted T logs 3.5 and of the "C. T. P." 3.71. The woods scal
showed an average of 3.37 logs to the thousand feet of the "C. O.
logs, 2.70 logs to the thousand feet of the inverted T logs, and
fraction over 2 logs to the thousand of the "C. T. P." logs.
Q. What do you refer to by "woods" scale?
A. A scale made in the woods of these different marks of logs.
Q. And you were comparing his report of his scale in the mil
with the woods scale?
A. Yes, sir; and other reasons were I went into the mill and saw
him sitting down and letting logs go by without putting his rul
on. Another reason was logs that had been boomed—tha
28 is, the end worn down by striking against obstructions i
the river, and he would hook on to the end of the log, if th
end had been worn off a couple of inches, and measure the timbe
in that way, instead of trying to get the actual diameter of the log
Q. Hooked on to the log?
A. Put his rule on to where this broomed end was and not ge
the full diameter of the log.
Q. What do you mean by the broomed end of the log?
A. Logs, having run down rapid rivers where there are rocks and
timber for the logs to come in contact with, get broomed on the end

more or less, and in cutting them in the woods they are cut a little longer than the lengths required for lumber so they can be trimmed off for that purpose, and where there is no lumber lost in the broomage the logs should be scaled according to its diameter as put into the river in the woods.

Q. What effect did hooking his scale on the broomed end of the log have upon determining the quantity?

A. If it was broomed off, say, three inches smaller than it was cut it would make three inches less in diameter—make a difference in size.

Q. You mean it would be equivalent to reducing the entire length of the log three inches in diameter instead of one end?

A. Yes, sir.

Q. And what did you then do?

A. I sent a man prior to this to scale beside that man.

Q. What man did you send?

A. George Massenett.

Q. Were you present when Massenett made his scale?

A. I was there, I believe, only one day he was scaling.

Q. What did he send Messenett there for?

A. To scale beside this other man.

Q. With what object in view?

To these questions the plaintiffs, by their counsel, then and there objected as being immateria ; which objection the court then and there sustained; to which ruling of the court the defendants, by their counsel, then and there duly excepted.

Q. Did you subsequently receive reports from Mr. Messenet of the scale made by him?

A. Yes, sir.

The witness here identifies the reports made to defendant by Massenet of the scale of the logs made by him, made by the side of Lawton, and they were marked respectively as Defendants' Exhibit- "A," "B," "C," "D," and "E," and were offered in evidence by the defendants and received without objection and are hereto annexed, marked Exhibits "A," "B," "C," "D," and "E," respectively.

Q. Upon getting these reports from Mr. Messenet what did you do with them?

A. Before I served that written notice I had some talk with their agent there.

Q. With regard to those?

A. With regard to the scale —the agent of the plaintiffs.

Q. What is his name?

A. Mr. Pierce.

Q. What talk did you have with him in regard to that scaling?

This question was then and there duly objected to by counsel for the plaintiffs on the ground that, Mr. Pierce being dead, the evidence was incompetent; whereupon the question was withdrawn and the following one was asked:

Q. I will ask you this: You spoke of Mr. Pierce being the agent of the plaintiffs. Where was he during all the time?

A. He was in Marinette most of the time.

Q. What was he engaged in doing?

A. Looking after the company's interests.

Q. Was he about the mill where these logs were being sawed?

A. A good deal of the time—part of the time.

Q. Now, what, if anything, did you do after ascertaining these facts—after getting these reports—in regard to bringing it to the attention of the plaintiffs?

A. I had a notice written to Mr. Street.

Q. Was it a notice of which the one in your answer is a copy?

A. Yes, sir.

Q. After receiving the plaintiffs' reply to your notice you may state what further you did in regard to objecting to Mr. Lawton's scaling or being retained as a scaler therein.

A. I have always protested against him scaling, but——

COURT: He asks you what you did. State any particular thing you did so far as these plaintiffs are concerned.

A. In the way of trying to have him stop scaling?

Q. Yes.

A. I have not done anything.

Q. Did you consent in any way after that to his being retained?

A. No, sir.

Q. Did Mr. Lawton continue to make reports of this scaling?

A. Yes, sir.

The foregoing was the direct testimony of said witness. He was thereupon cross-examined.

31 The defendants thereupon called the witness A. B. LAWTON as a witness for themselves, who identified Exhibits "F," "G," "H," "I," "J," and "K" as the daily scale report made by him while Mr. Messenet was scaling the same logs at his side. Such exhibits were thereupon offered in evidence by the defendants and received without objection.

The defendants then produced as a witness in their behalf CLAUDE G. MESSENET, who, being first duly sworn as a witness in the case, testified, among other things, as follows:

"I have followed the business of scaling logs and tallying and sawing lumber for twenty years and upwards; in the Menomi[illegible] the district of northern Wisconsin and northern Michigan for [illegible]e timber five years. I scaled logs in Ludington, Wells and Va[illegible] of the log. river mill by the side of Lawton in '87, and made [illegible] scale each night on postal cards."

Witness here identified Exhibits A, B, C, D, E, an[illegible] as and not get ports. These cards contain a correct scale made [illegible]e log? correct number of logs scaled by me of the mar[illegible]re are rocks and them on the dates of the various cards. Lawton [illegible]med on the end

same logs at the same time and at the same place. We used the Doyle rule. In making the scale of these logs I made allowance for all the defects and imperfections, and these reports show the correct scale of superficial feet, sawn lumber. While scaling these logs one test was made of the correctness of my scale and Lawton's. A hollow log came up the slide. I followed it into the mill. Mr. Pierce was there, and I asked Lawton how many feet it contained. He said 400. I said I should put it down at 500. Mr. Lawton told me it scaled 525 feet. It held out that—that it produced 525 feet of lumber after the sawing; that was a log that had a hollow—continuous hollow—from end to end. We both scaled the log before it was sawed, and he scaled it at 400 and I at 500 feet. He
32 showed the contents by his scaling to be 400 and I by my scaling 500. The actual result after sawing was 525 feet; that is what Mr. Lawton told me. We had both excluded all defects in that log before reaching the amount of our scale. Mr. Lawton made his scale of these logs while I was there nearly always sitting down. There was a chair or elevated seat where he could sit down and catch the logs as they went by with a hooked rule. I stood on the slide midway as a general thing, except when the weather was inclement. I then went inside and either stood beside him or opposite him, but that was very seldom. He put his rule on a log as he could get a chance as it was going in; sometimes perhaps right; sometimes it would not be. In regard to the broomed log—broomed on the end or defective—he would put his rule on just as he could catch it; he didn't have time enough—opportunity enough. The purpose in putting the rule on a log is to take the diameter of the log. A log broomed on the end, allowance should be made so as to show what it would trim after it was sawn—after excluding the trimmed end. He would grasp such a log where he could conveniently as the log went by him. Sitting in a chair, he would put his rule across it. It was impossible for him to do the log justice to reach out where the log was worn. I saw him put his rule upon the logs, and it was across from where I was standing. He would reach out and make a grasp at it. I saw logs where the small end was partly worn away—abraded off. He put his scale on logs of that kind where it was most convenient, and it would often result in a loss. The proper way of ascertaining the contents of a log that had a broomed end upon it would be to get a fair diameter; that would be after allowing for trimming.
33 By trimming I mean that frequently there are logs that are worn away on the end through encounters in driving. Unless a person is very particular in putting his rule upon them it would result in a loss from one to maybe three inches in diameter. On such a log he should shove his rule out so it would be about square with the face or where the log would be properly trimmed. Mr. Lawton did not frequently put his rule on in that way. He would put his rule where it would touch, and outside of it there would be perhaps an inch, perhaps more; sometimes he would have it right.

The defendants then produced testimony by the scalers who made the woods scale, showing the whole number of the three marks of logs described in the complaint and the quantity of feet contained in them, as shown by the scale made of them in the woods, the whole number so shown, after deducting the number of logs, viz., 1,014, constituting the 300,019 feet referred to in the contract sued on as having been sold and delivered prior to the date of such contract, being 16,811 and containing 5,332,339 feet; and it was testified that this result was arrived at after making allowances for all visible defects and imperfections in each log according to the judgment of the scaler who scaled each mark of logs.

The defendants, further to maintain the issues on their part, then produced GEORGE R. ARNOLD as a witness, who, having been duly sworn, testified as follows:

"My occupation is that of assistant superintendent of the Marinette Saw Mill Company, which company is located at Marinette, Wisconsin, and its business is that of manufacturing lumber. The Marinette Saw Mill Company manufactured lumber for
34 Street, Chatfield & Company during the years 1888 and 1889.

The following question was then asked the witness by Mr. Webster:

Q. Who scaled the logs in that mill in front of the saw?

To this question the plaintiffs, by their counsel, then and there duly objected on the ground that the same was immaterial.

And the court thereupon sustained the objection and excluded the testimony; which ruling of the court the defendants then and there duly excepted to.

The following question was then asked the witness by Mr. Webster:

Q. What was the difference in the lumber product actually sawed in the Marinette Saw Mill Company's mill out of those logs scaled by Lawton in front of the saw—between the product and his scale of the logs in front of the saw?

To this question the plaintiffs, by their counsel, then and there objected on the ground that the same was immaterial; which objection was then and there sustained by the court and the answer of the witness excluded; to which ruling of the court the defendants then and there duly excepted.

The following question was then asked the witness by Mr. Webster:

Q. What do you know of your own knowledge of the manner of Mr. Lawton's scaling those logs scaled by him in 1888 and 1889, in the Marinette Saw Mill Company's mill, being sawed for Street, Chatfield and Co.?

To this question the plaintiffs, by their counsel, then and there objected on the ground that the same was immaterial; which objection—the defendant's counsel having, upon inquiry by the court,

stated that the question did not relate to the logs in controversy in this suit—was then and there sustained by the court and the
35 answer of the witness excluded; to which ruling of the court the defendants, by their counsel, then and there duly excepted.

Further to maintain the issues on their part the defendants then produced and offered in evidence the deposition of George W. Hanley, and read therefrom as follows:

United States Circuit Court for the Eastern District of Wisconsin.

CHARLES A. STREET *et al.*
vs.
WALLACE P. COOK *et al.*

Deposition of G. W. Hanley on behalf of the defendants, taken on the 24th day of October, 1890, at Marinette, Wisconsin, and Menominee, Michigan, before James H. Barry, notary public, pursuant to the annexed stipulation.

Mr. W. H. Webster appeared on behalf of the defendants, and Mr. E. H. Bottum on behalf of the plaintiffs.

G. W. HANLEY, being first duly sworn, testified as follows:

(Examined by Mr. WEBSTER:)

Q. Mr. Hanley, you may state what, if any, official position you occupy with the Menominee River Boom Company at the present time.
A. I am the secretary of the boom company.
Q. How long have you been secretary of that company?
A. Since the first of January.
Q. January last?
A. Yes, sir.
Q. I wish to have you state, Mr. Hanley, what quantity of logs in the aggregate made up — the following marks, viz., one of
36 them "C. O.," others of double T mark, so called, and others of "C. T. P.," has been scaled through the booms of the Menominee River Boom Company or was scaled through those booms during the season of 1888 and up to the close of the sawing season of 1889.

The plaintiffs objected to the reading of the answer to this question, and also the remainder of the deposition, because it appeared in the cross-examination of the witness, being part of the deposition, that he was not with the Menominee River Boom Company in 1888 and 1889 and had no personal knowledge of the matters inquired of and testified from reports made by scalers of the company; which objection the court then and there sustained; to which ruling of the court the defendants, by their counsel, then and there duly excepted.

The plaintiffs gave rebutting evidence, and the actual lumber product of the logs delivered which were sawed was given in evidence.

Both parties here rested their case.

The jury was then addressed by counsel for the respective parties, after which the court charged the jury as follows:

37 GRESHAM, *J.*:

The logs, gentlemen, were scaled in the woods on the river bank before they were floated down, and the plaintiffs made provisional payments or advances upon the basis of that scaling, it being provided in the contract that the amount ultimately due from the plaintiffs to the defendants should be determined by the scaling at the mill.

It is insisted by the plaintiffs that they paid for more lumber than they received, according to the terms of the contract, and this suit is brought to recover the excess, with interest from the time of demand. The defendants, on the other hand, insist that instead of making an overpayment—instead of paying them more than they were entitled to—the plaintiffs did not pay them as much as the lumber sawed and delivered amounted to, according to the terms of the contract, and there is a counter-claim demanding judgment for the alleged balance.

I will ask you to give particular attention to the following clauses in the contract:

"All of the logs so delivered, as herein provided, shall be
38 scaled by Doyle scale rule in the mill where sawed, by a good and competent scaler. Albert B. Lawton, who is now scaling at Ludington, Wells and Van Schaick's river mill, at Monominee, is to scale the logs, so long as he scales fairly, who shall make proper allowances for shakes, rot and other defects that will render the lumber product unmerchantable. If either of the parties to this contract shall at any time deem the scale as made by the scaler under the scaling instructions herein unfair or improper, upon good reason of such unfair and improper scaling, a new man may be selected who shall be agreeable to the parties hereto, who shall scale said logs as long as he scales fairly. In case any disagreement shall arise as to the fairness of any scaler's scale, and the parties hereto are unable to settle the same, then three disinterested persons shall be chosen at once and without delay, one by each party hereto, the two to choose the third, who shall decide as to such fair scaling; this contract to be taken as the basis for such test as to said scale."

You will observe, gentlemen, by the terms of these clauses that the parties by their agreement made Lawton the scaler, and he was to scale all of the logs at the mill, not for one party to the contract, but for both, and so long as he honestly exercised his judgment both parties were absolutely bound by his reports of scaling. Neither party was authorized to set him aside without cause; he could, however, be set aside and another substituted in his

place at the instance of either party, that party showing, however, to the other evidence fairly indicating that Lawton was not scaling fairly or according to the terms of the contract. Neither party had mere arbitrary right to say that Lawton should scale no longer; that was as much a part of the contract as anything else—I mean his selection as scaler. Neither could dispense with his services without the consent of the other unless it was fairly made to appear that Lawton was incompetent or untrustworthy, that he was purposely making an incorrect scale, and if it appeared to either party that Lawton was not scaling according to the contract, that, if capable, he was not honestly exercising his judgment, that he was not acting impartially, the right existed to inform the other party to the contract of that fact. If that was discovered and a proper showing made to the other side and the other side objected to his removal, the subsequent scaling of Lawton would have no binding force. All the defendants had to do to get rid of Lawton's scaling—the binding force of his scaling—was to present to the plaintiffs proofs or facts fairly showing that Lawton was not doing his duty. Whenever such a showing was made it was the duty of the plaintiffs at once to consent to the substitution of another man, and if upon a proper showing they refused to agree to such substitution, then they had no right to insist upon the binding force thereafter of Lawton's scaling.

The defendants claim to have become dis-atisfied with Lawton's action, and I will read to you the letter which has already been read and commented upon by counsel:

"Messrs. Street, Chatfield & Co.

GENTLEMEN: Take notice that I deem the scale now being made and heretofore made by Albert B. Lawton of the logs sold you by me by contract dated July 12th, 1887, unfair and improper, and require that you join me in the selection of a new man to carry on the scaling of these logs in the manner provided by said contract."

The defendants deemed the scaling of Lawton unfair. How unfair? In what? What evidence did they bring to the plaintiffs of unfair scaling by Lawton? There is nothing in this letter of itself—and I leave it to you to say whether there was any other evidence but this—showing the plaintiffs that Lawton was not doing his duty according to the terms of the contract. The letter simply says that the defendants deem that Lawton is not doing his duty; that he is not scaling according to the terms of the contract. Before the plaintiffs could be required to consent to the removal of Lawton and substitution of another it was necessary that the plaintiffs should be informed by the defendants wherein Lawton was not doing his duty as a scaler, and until the plaintiffs were furnished with facts which fairly showed that Lawton was not doing his duty the plaintiffs had the right to say that they would stand by the contract, part of it being that Lawton should do the scaling. As I have stated to you before, neither party could get rid of Lawton without showing

to the satisfaction of the other that he was not scaling according to the terms of the contract. It is not necessary to read the plaintiffs' reply to this letter. They refused to consent to the removal of Lawton. They refused to agree to the substitution of another scaler. On the statements of the letter addressed by the defendants to the plaintiffs the latter were authorized to decline to accede to the
41 proposition. What evidence is there, other than you have in this letter addressed to the plaintiffs, that they, the plaintiffs, knew that Lawton was not doing his duty, if indeed he was not doing his duty? And what evidence have you—that is a question strictly for the jury—that Lawton did not scale this lumber according to the terms of this contract? Bear in mind what I have said already, that if he scaled there according to his best judgment, and his judgment was now and then at fault, the parties were bound by his scaling reports. The defendants cannot escape from the binding force of those reports without evidence supporting the charge of fraud.

One of the paragraphs of the answer charges that Lawton was an employé of the plaintiffs; that the plaintiffs induced the defendants to agree to his appointment as scaler that he might underscale the logs in the interest of the plaintiffs; that there was a conspiracy of that kind between Lawton and the plaintiffs, and that in pursuance of it Lawton did underscale the logs purposely to defraud the defendants and in the interest of the plaintiffs. If you believe from the evidence—and bear in mind that you cannot presume fraud—that Lawton purposely underscaled the logs, you will disregard his scaling reports, whether the plaintiffs knew of his fraud or not. Bear in mind I mean a wilful underscaling, not a mere mistake in judgment on the part of Lawton. Some one had to do the scaling, which, after all, was only an approximation; it is not absolutely correct; any one is liable to make a mistake; some logs might be scaled too high, others too low. If you are satisfied that
42 Lawton's scaling was fraudulent, you will disregard his scaling reports and reach a conclusion as best you can upon all the evidence before you. Now, what is the evidence in support of the charge of fraud as against Lawton alone or as between him and the plaintiffs? It is not necessary to sum it all up; you will remember what has been commented upon by counsel. You have the wood scale. You have the inspector's testimony. If the defendants discovered that Lawton was underscaling, what was the natural thing for them to have done? It was a matter that concerned them very vitally. Did they do what reasonable men would be expected to do under such circumstances? Did they tell Lawton or the plaintiffs what they had discovered or thought they had discovered? They had it in their power to stop Lawton at once by writing to the plaintiffs or otherwise informing them of his action, and that they would not be bound longer by his acts. Did they inform the plaintiffs that Lawton was acting dishonestly by wilfully underscaling the logs? I leave it to you to say whether, having discovered such a fraud, they would remain quiet and employ another man to scale by the side of Lawton, keep him for a time and then discharge

him and let Lawton go on and scale the balance of the logs. Was there any other means by which they might more conclusively have established the fact, if it was a fact, that Lawton was scaling fraudulently? Could they have determined it by counting the lumber from given logs? So far as the wood scale is concerned, it does not govern the rights of the parties. That was adopted, as I have already stated, provisionally. It was necessary, I presume, that
43 the plaintiff should make advance payments to the defendants, and those advances were made on the basis of the wood scales; but the scale that was to ultimately determine the rights of the parties and the amount of lumber for which the plaintiffs were to pay the defendants was the mill scaling; and it all comes back to this: The parties are absolutely bound by the scale made by Lawton, unless the defendants have shown by a clear preponderance of the evidence that such fraud existed as is charged in their answer. Have they established it? If you find that the scaling was fraudulent, you will determine then, as nearly as you can from the proof before you, how much lumber was received by the plaintiffs; and if you find that the plaintiffs have not paid for all that they received the defendants are entitled to a verdict on their counter-claim for the balance due, unless, however, you find that the scaling was fraudulent, and you can only find that upon the evidence before you—you cannot indulge suspicions; you will determine the amount due from the defendants to the plaintiffs on the assumption that the scaling by Lawton was correct and give the plaintiffs a verdict for any overpayment made, and to that you will add any amount paid by the plaintiffs in removing charges on the logs before they were received at the booms, and the plaintiffs are also entitled to recover in that event one-half of the charges they paid for the mill scaling and the defendants are entitled to the deductions which have already been conceded and referred to by Gen. Winkler.

You may not be able to reach an absolutely correct result;
44 you cannot determine the exact amount due from one party to the other; it is a good deal like scaling; it is only a presumption. Exercise your best judgment as to the amount due from one to the other and try and settle the controversy between them.

The jury then retired in charge of an officer sworn to the performance of his duty to consider their verdict, and subsequently returned a verdict into court in favor of the plaintiffs, whereby they found for the plaintiffs and assessed their damages at the sum of five thousand nine hundred and thirty-four and $\frac{88}{100}$ dollars ($5,934.88), which verdict was duly taken and entered and the jury was then discharged.

The defendants then at the same time and before judgment was entered moved the court upon its minutes to set aside the verdict of the jury and to grant them a new trial of the action for errors committed by the court:

1st. In excluding the testimony offered by the defendants in the

particulars where the rulings of the court excluding such testimony were excepted to by the defendants at the trial.

2nd. In its construction of the contract sued on herein in the particulars with reference to which exceptions were taken by the defendants at the trial to the expressions of the court declaring such erroneous construction.

3rd. In its construction of the law of fraud in such cases with reference to which exceptions were taken by the defendants at the trial to the expressions of the court declaring such erroneous construction.

45 4th. In that part of its charge to the jury wherein the same erroneous construction of the said contract and of the law of fraud in such cases was repeated.

Which motion the court then and there overruled; to which action and ruling of the court the defendants, by their counsel, then and there duly excepted.

After judgment and at the same term the defendants filed with the clerk of this court exceptions to the court's charge to the jury in the words and figures following, to wit:

United States Circuit Court, Eastern District of Wisconsin.

CHARLES A. STREET *et al.*
vs.
WALLACE P. COOK *et al.*

And now come the defendants in the above-entitled action, by their counsel, and make the following exceptions to the court's charge to the jury:

First. To that part of the charge commencing in the 20th line of the 2nd page and ending in the 22nd line of the same page reading as follows: "and so long as he honestly exercised his judgment both parties were absolutely bound by his reports of scaling."

Second. To that part of the charge commencing in the 25th and ending in the 27th line of the 2nd page reading as follows: "that party showing, however, to the other evidence fairly indicating that Lawton was not scaling fairly or according to the terms of the contract."

Third. To that part of the charge commencing in the 5th
46 and ending in the 6th line of the 3rd page reading as follows: "that he was purposely making an incorrect scale."

Fourth. To that part of the charge commencing and ending in the 11th line of the third page reading as follows: "and a proper showing made to the other side."

Fifth. To that part of the charge commencing in the 13th and ending in the 16th line of the 3rd page reading as follows: "All the defendants had to do to get rid of Lawton's scaling—the binding force of his scaling—was to present to the plaintiffs proofs or facts fairly showing that Lawton was not doing his duty."

6th. To that part of the charge commencing in the 5th and ending in the 6th line of the 4th page reading as follows: "How un-

fair? In what? What evidence did they bring to the plaintiffs of unfair scaling by Lawton?"

7th. To that part of the charge commencing in the 6th and ending in the 10th line of the 4th page reading as follows: "and I leave it to you to say whether there was any other evidence but this—showing the plaintiffs that Lawton was not doing his duty according to the terms of the contract."

8th. To that part of the charge commencing in the 12th and ending in the 20th line of the 4th page reading as follows: "Before the plaintiffs could be required to consent to the removal of Lawton and substitution of another it was necessary that the plaintiffs should be informed by the defendants wherein Lawton was not doing his duty as a scaler, and until the plaintiffs were furnished with facts which fairly showed that Lawton was not doing his duty the plaintiffs had the right to say they would stand by the contract, part of it being that Lawton should do the scaling."

9th. To that part of the charge commencing in the 20th
47 and ending in the 23rd line of the 4th page reading as follows: "As I have stated to you before, neither party could get rid of Lawton without showing to the satisfaction of the other that he was not scaling according to the terms of the contract."

10th. To that part of the charge commencing on the 26th line of the 4th page and ending in the first line of the 5th page reading as follows: "On the statements of that letter addressed by the defendants to the plaintiffs the latter were authorized to decline to accede to the proposition."

11th. To that part of the charge commencing in the 6th and ending in the 9th line of the 5th page reading as follows: "Bear in mind what I have said already, that if he scaled there according to his best judgment, * * * and his judgment was now and then at fault, the parties were bound by his scaling reports."

12th. To that part of the charge commencing in the 9th and ending in the 11th line of the 5th page reading as follows: "The defendants cannot escape from the binding force of those reports without evidence supporting the charge of fraud."

Dated December 22nd, 1890.

WEBSTER & WHEELER,
Attorneys for the Defendants.

And because none of the foregoing acts, facts, matters, or things appear of record in this cause the defendants have applied to have the foregoing settled and signed as the bill of exceptions in this case, and the same is accordingly so settled and signed this 8th day of November, 1890.

WALTER Q. GRESHAM,
Circuit Judge.

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One cent.

Nothing but the address to be on this side.

GEO. BEYER, Esq.,
Oconto, Wis.

48 MENOMINEE, MICH., *Aug.* 29, 1887.

Daily Log Report.

End mark.	Bark mark.	No. of logs.	No. of feet.	
C O		406	91,346	No. 1.
T T		23	8,445	
C T P	T y	12	4,723	

Def'ts' Ex. "A." C. G. MESSENETT, *Scaler.*

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GEO. BEYER,
Oconto, Wis.

48*a* MENOMINEE, MICH., *Sept.* 20, 1887.

Daily Log Report.

End mark.	Bark mark.	No. of logs.	No. of feet.	
C O		162	36,170	No. 4.
T T		22	6,803	
C T P	T y	5	2,197	

Def'ts' Ex. "B." C. G. MESSENETT, *Scaler.*

United States
Postal [Vignette] card.
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GEO. BEYER, Esq.,
Oconto, Wis.

48*b* MENOMINEE, MICH., *Sept.* 1, 1887.

Daily Log Report.

End mark.	Bark mark.	No. of logs.	No. of feet.	
C O		119	21,815	No. 4.
T T		12	3,480	
C T P	T y	4	1,540	

Def'ts' Ex. "C." C. G. MESSENETT, *Scaler.*

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GEO. BEYER, Esq.,
Oconto, Wis.

48*c* MENOMINEE, MICH., *Aug.* 30, 1887.

Daily Log Report.

End mark.	Bark mark.	No. of logs.	No. of feet.	
C O		511	123,435	No. 2.
T T		7	2,467	
C T P	T y	4	1,508	

Def'ts' Ex. "D." C. G. MESSENETT, *Scaler.*

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Geo. Beyer, Esq.,
Oconto, Wis.

48*d* Menominee, Mich., *Aug.* 31, 1887.

Daily Log Report.

End mark.	Bark mark.	No. of logs.	No. of feet.	
C O	W	537	129,889	No. 3.
T T	X	16	6,601	
C T P	T y	3	1,493	

Def'ts' Ex. "E." C. G. MESSENETT, *Scaler.*

United States
Postal [Vignette] card.
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W. P. Cook & Bro.,
Oconto, Wis.

48*e* Menominee, Mich., *August* 29, 1887.

Daily Log Report.

End mark.	Bark mark.	No. of logs.	No. of feet.	
C O	W	406	76,128	No. 10.
T T	X	23	7,817	
C T P	T y	12	4,282	

Def'ts' Ex. "F." ALBERT B. LAWTON, *Scaler.*

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W. P. Cook,
Oconto, Wis.

48*f* Menominee, Mich., *Sept. 20th*, 1887.

Daily Log Report.

End mark.	Bark mark.	No. of logs.	No. of feet.	
C O	W	162	30,188	No. 16.
T T		22	6,231	
C T P	T y	5	2,157	

Def'ts' Ex. "G." ALBERT B. LAWTON, *Scaler.*

United States
Postal [Vignette] card.
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W. P. Cook,
Oconto, Wis.

48*g* Menominee, Mich., *Sept. 1st*, 1887.

Daily Log Report.

End mark.	Bark mark.	No. of logs.	No. of feet.	
C O	W	119	18,204	No. 13.
T T		12	3,237	
C T P	T y	4	1,336	

Def'ts' Ex. "H." ALBERT B. LAWTON, *Scaler.*

United States
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W. P. Cook & Bro.,
Oconto, Wis.

48*h* Menominee, Mich., *Aug.* 30, 1887.

Daily Log Report.

End mark.	Bark mark.	No. of logs.	No. of feet.
C O	W	503	107,111
		7	2,262
C T P	T y	4	1,257

Def'ts' Ex. "I." ALBERT B. LAWTON, *Scaler.*

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Postal [Vignette] card.
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W. P. Cook,
Oconto, Wis.

48*i* Menominee, Mich., *August* 31, 1887.

Daily Log Report.

End mark.	Bark mark.	No. of logs.	No. of feet.
C O	W	542	107,170
T T		15	5,499
C T P	T y	3	1,493

Def'ts' Ex. "J." ALBERT B. LAWTON, *Scaler.*

No. 12.

United States
Postal [Vignette] card.
One cent.

Nothing but the address to be on this side.

W. P. Cook,
Oconto, Wis.

48*j* MENOMINEE, *Sept.* 1, '87.

Mr. W. P. Cook.

D'R SIR: In making out report No. 12 (date, Aug. 31st, '87) I may have left out Norway logs. The report should read as follows:

Mark.	Pieces.	Feet.
C O	551	107,170
T	15	5,499
C T P	3	1,493

If I have made a mistake please return it to me & I will rectify it.

Yours, A. B. LAWTON.

Def'ts' Ex. "K."

49 November 17, 1890.—This day came the defendants and filed their bond in the sum of ten thousand dollars, with George Beyer and W. K. Smith as sureties, conditioned that they shall prosecute a writ of error to effect and answer all damages and costs if they fail to make their plea good; which bond is approved by the district judge and is as follows:

Know all men by these presents that we, Wallace P. Cook and Willard P. Cook, of Oconto, Wisconsin, as principals, and George Beyer and W. K. Smith, of Oconto, Wis., as sureties, are held and firmly bound unto Charles A. Street, W. B. Chatfield, and F. A. Keep, of the city of Chicago, in the State of Illinois, in the full and just sum of ten thousand dollars, to be paid to the said Charles A. Street, W. B. Chatfield, and F. A. Keep or to their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 15th day of November, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a term of the circuit court of the United States for the eastern district of Wisconsin, in a suit depending in said court between the said Charles A. Street, W. B. Chatfield, and F. A.

Keep as plaintiffs and the said Wallace P. Cook and Willard P. Cook as defendants, a judgment was rendered against the said Wallace P. Cook and Willard P. Cook on the 8th day of November, A. D. 1890, for the sum of $6,084.58, damages and costs, and the said Wallace P. Cook and Willard P. Cook having obtained a writ of error and filed a copy thereof in the clerk's office of the
50 said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Charles A. Street, W. B. Chatfield, and F. A. Keep, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Wallace P. Cook and Willard P. Cook shall prosecute their writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

WALLACE P. COOK. [SEAL.]
WILLARD P. COOK. [SEAL.]
GEO. BEYER. [SEAL.]
W. K. SMITH. [SEAL.]

Sealed and delivered in presence of—

T. A. PAMPERIN.
J. B. GRUNERT.

STATE OF WISCONSIN, } ss:
Oconto County, }

George Beyer and W. K. Smith, being severally duly sworn, depose and say each for himself that he is one of the sureties who signed the foregoing bond, and is worth the sum of ten thousand dollars over and above all his debts, liabilities, and exemptions in property in the State of Wisconsin.

GEO. BEYER.
W. K. SMITH.

Subscribed & sworn to before me this 15th day of Nov., 1890.

[SEAL.] T. A. PAMPERIN,
Notary Public, Brown Co., Wis.

Approved by—

JAS. G. JENKINS,
U. S. Judge.

51 Whereupon it is ordered that execution be superseded and a writ of error and citation issued and a copy of said writ of error lodged for the defendants in error.

52 And same day assignment of errors filed as follows:

Circuit Court of the United States for the Eastern District of Wisconsin.

CHARLES A. STREET, W. B. CHATFIELD, and F. A. KEEP, Plaintiffs,
vs.
WALLACE P. COOK and WILLARD P. COOK, Defendants.

Assignment of Errors by the Defendants.

Now come the defendants and say that in the record and proceedings herein there is manifest error, in this, to wit:

First. In the action of the court in sustaining the objection made by plaintiffs' counsel to the following question propounded by defendants' counsel to defendants' witness George R. Arnold, to wit: "Q. Who scaled the logs in that mill in front of the saw?" and in excluding the said witness' answer to that question.

Second. In the action of the court in sustaining the objection of plaintiffs' counsel to the following question propounded by defendants' counsel to defendants' witness George R. Arnold, to wit: "Q. What was the difference in the lumber product actually sawed in the Marinette Saw Mill Co.'s mill out of those logs scaled by Lawton in front of the saw, between the product and his scale of the logs in front of the saw?" and in excluding the said witness's answer to that question.

Third. In the action of the court in sustaining the objection made by plaintiffs' counsel to the following question pro-
53 pounded by defendants' counsel to defendants' witness George R. Arnold, to wit: "Q. What do you know of your own knowledge of the manner of Mr. Lawton's scaling those logs scaled by him in 1888 and 1889 in the Marinette Saw Mill Co.'s mill being sawed for Street, Chatfield & Co.?" and in excluding said witness' answer to said question.

Fourth. In the action of the court in sustaining the objection made by plaintiffs' counsel to the following question propounded by defendants' counsel to defendants' witness G. W. Hanley, to wit: "Q. I wish to have you state, Mr. Hanley, what quantity of logs in the aggregate made up of the following marks, viz., some of them 'C. O.,' the double T. mark, so called, and others of 'C. T. P.,' has been scaled through the booms of the Menominee River Boom Company or was scaled through those booms during the season of 1888 and up to the close of the sawing season of 1889," and in excluding witness' answer to said question.

Fifth. In that part of the court's charge to the jury set forth in defendants' first exception to such charge.

Sixth. In that part of the court's charge to the jury set forth in defendants' second exception to such charge.

Seventh. In that part of the court's charge to the jury set forth in defendants' third exception to such charge.

Eighth. In that part of the court's charge to the jury set forth in defendants' fourth exception to such charge.

Ninth. In that part of the court's charge to the jury set forth in defendants' fifth exception to such charge.

Tenth. In that part of the court's charge to the jury set forth in defendants' sixth exception to such charge.

Eleventh. In that part of the court's charge to the jury set forth in defendants' seventh exception to such charge.

54 Twelfth. In that part of the court's charge to the jury set forth in defendants' eighth exception to such charge.

Thirteenth. In that part of the court's charge to the jury set forth in defendants' ninth exception to such charge.

Fourteenth. In that part of the court's charge to the jury set forth in defendants' tenth exception to such charge.

Fifteenth. In that part of the court's charge to the jury set forth in defendants' eleventh exception to such charge.

Sixteenth. In that part of the court's charge to the jury set forth in defendants' twelfth exception to such charge.

Seventeenth. In the action of the court in refusing to grant defendants' motion to set aside the verdict of the jury and grant them a new trial.

WEBSTER AND WHEELER,
Defendants' Attorneys.

55 UNITED STATES OF AMERICA, }
Eastern District of Wisconsin, } *ss:*

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the foregoing writings annexed to this certificate with their originals now on file and remaining of record in my office, and that they are true copies of such originals and correct transcripts therefrom, being a transcript of record in the case of Wallace P. Cook *et al.*, plaintiffs in error, *vs.* Charles A. Street *et al.*

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in said district, this 17th day of April, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the 117th.

Seal U. S. Circuit Court, Eastern District Wisconsin.

EDWARD KURTZ, *Clerk.*

56 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of America for the Eastern District of Wisconsin, Greeting:

[Seal U. S. Circuit Court, Eastern District Wisconsin.]

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between Charles A. Street, W. B. Chatfield, & F. A. Keep, plaintiffs, and Wallace P. Cook and Willard P. Cook, defendants, a manifest error hath happened, to the great damage of the said Wallace

P. Cook and Willard P. Cook, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error that of right and according to law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 17th day of November, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the 115th.

EDWARD KURTZ,
Clerk U. S. Circuit Court for the Eastern District of Wisconsin.

[Endorsed:] Filed November 17, 1890. Edward Kurtz, clerk.

57 UNITED STATES OF AMERICA, *ss:*

[SEAL.] To Charles A. Street, W. B. Chatfield, and F. A. Keep, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Wisconsin, wherein Wallace P. Cook and Willard P. Cook are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable James G. Jenkins, district judge of the United States for the eastern district of Wisconsin, at the city of Milwaukee, this 17th day of November, A. D. 1890, and of the Independence of the United States the 115th.

JAS. G. JENKINS,
U. S. Judge.

We accept service of above citation this 29th day of November, A. D. 1890.

WINKLER, FLANDERS,
SMITH, BOTTUM & VILAS,
Pl'ffs' Att'ys.

Endorsed on cover: Case No. 15,297. E. Wisconsin C. C. U. S. Term No., 226. Wallace P. Cook and Willard P. Cook, plaintiffs in error, *vs.* Charles A. Street, W. B. Chatfield, & F. A. Keep. Filed April 20th, 1893.

Office Supreme Court, U. S.
FILED.
APR 14 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 226.

WALLACE P. COOK ET AL.,

Plffs. in Error,

vs.

CHARLES A. STREET ET AL.,

Defts. in Error.

BRIEF FOR PLFFS. IN ERROR.

W. H. WEBSTER,
Attorney for Plffs. in Error.

Reporter Print, Oconto, Wis.

Supreme Court of the United States.

WALLACE P. COOK AND WILLARD P. COOK,

Plaintiffs in Error,

vs.

CHARLES A. STREET, W. B. CHATFIELD AND F. A. KEEP,

Defendants in Error.

ABSTRACT OF THE CASE.

Defendants in error instituted this suit to recover, upon contract, an alleged over-payment of $13,464.44 with interest.

The contract (Exhibit "A", page 4, Record) was for the sale and delivery to them, by plaintiffs in error, of a lot of pine saw logs, to be settled for, finally, at the rate of $11.00 per thousand feet according to a scale, by the Doyle rule, of the logs *to be made in the mill where sawed.*

A scale of the logs made in the woods where they were cut, showing a total of 5,336,747 feet, was to be the basis *for advance payments* at the rate of $10.00 per thousand feet.

This required an advance payment of $53,367.47 which, at the rate of $11.00 per thousand feet, would fully pay for 4,851,580 feet of the logs, and the contract provided that after that quantity had been scaled *at the mill*, it should be considered as satisfying the $53,367.47 to be advanced and *then* that the logs thereafter delivered and scaled should be paid for at the rate of $11.00 per thousand feet, mill scale, every thirty days until all logs sold under the contract were delivered.

The contract further provided that "If at the close of the sawing season of 1889, 4,851,580 feet of said logs have not been received, which amount, figured at the rate of Eleven ($11.00) Dollars per thousand feet, is necessary to cancel the payments made by said first party, the said second party shall, upon demand, pay back to said first party such overpayment."

The scale of the logs *at the mill* was to be made by a "good and competent scaler (Albert B. Lawton, who is now scaling at Ludington, Wells & Van Schaick's river mill at Menominee, is to scale the logs *so long as he scales fairly*) who shall

make proper allowances for shakes, rot and other defects that will render the lumber product unmerchantable:" fol. 8, Record. The same clause of the contract provides that "If either of the parties to this contract shall at any time deem the scale as made by the scaler, under the scaling instructions herein, unfair or improper, upon good reason of such unfair or improper scaling, a new man may be selected who shall be agreeable to the parties hereto, who shall scale said logs so long as he scales fairly. In case any disagreement shall arise as to the fairness of any scaler's scale and the parties hereto are unable to settle the same, then three disinterested persons shall be chosen at once and without delay, one by each party hereto, the two to chose the third, who shall decide as to such fair scaling; this contract to be taken as the basis for such test as to said scale."

The pleadings settle the making of the contract, the making of the advances required by it, and the delivery from time to time, by the plaintiffs in error, of logs under the contract at the place contemplated. But the parties agree no further. The complaint charges that the logs delivered "were scaled by the Doyle scale rule in the mill where the same were sawed, by a good and competent scaler, to-wit: Albert B. Lawton, in said contract named, and proper reports of such scaling were furnished to said parties as provided in said contract; that by the close of the sawing season of 1889, 4,851,580 feet of said logs had not been delivered by said defendants or received by these plaintiffs, and that the total number of logs delivered by the defendants and received by the plaintiffs under said contract by the close of said sawing season amounted to only 3,633,890 feet of logs, Doyle scale, and that that was the total amount thereof, as scaled at the mill where the same were sawed in accordance with said contract": fol. 4, Record. According to Lawton's scale, the plaintiffs in error, at the rate of $11.00 per thousand feet, would be entitled to but $39,972.78 for the logs delivered up to the close of the sawing season of 1889. The defendants in error admit in their complaint the receipt of $173.37 from a stray log-committee on-account of 22,069 feet of these logs, which makes a total of $40,146.15, which they claim constitutes the total credit plaintiffs in error are entitled to; and having paid, for plaintiffs in error, the sum of $178.70 as tolls on the logs, and also one-half of $128.84 as their share of the scaler's wages, making a total, paid, of $53,610.59, recovery is demanded of $13,464.44, the difference between the total payments made and the amount claimed in the complaint to be the rightful amount plaintiffs in error were entitled to have for the logs delivered by them under the contract.

There is no controversy about the item of $178.70 for tolls and one-half of the item of $128.84 for scaler's wages. The trouble grew out of Lawton's scale at the mill of the delivered logs. The plaintiffs in error state in their answer, in substance, that they soon became convinced, after Lawton commenced scaling the logs in the mill, that he was not making a fair or proper scale and that they then put a competent and disinterested scaler of good repute, one Messenett, in the mill to scale at the side of Lawton; that each used the Doyle scale rule and made daily reports to the plaintiffs in error, of their respective scales of the same logs; that the reports showed so great a difference in the contents of the logs scaled by them that, after they had scaled five days or more, together, and every day's report showed Lawton's scale to be very greatly less than Messnett's of the same logs, they, plaintiffs in error, caused the defendants in error to be served with a printed or written notice, of which the following is a copy, to-wit:

"OCONTO, WISCONSIN, Sept. 9, 1887.

MESSRS. STREET, CHATFIELD & CO.,

GENTLEMEN:—Take notice that I deem the scale now being made and heretofore made by Albert B. Lawton of the logs sold you by me by contract dated July 12, 1887, unfair and improper and require that you join me in the selection of a new man to carry on the scaling of those logs in the manner provided in said contract.

W. P. COOK,
BY WEBSTER & WHEELER,
His Attorneys."

The answer also shows that the defendants in error replied to said notice as follows:

"CHICAGO, Sept. 27, 1887.

MESSRS. W. P. COOK & BRO.,
Oconto, Wisconsin.

GENTLEMEN:—Your communication of Sept. 9th was received by Mr. Nathan Pierce, at Marinette, Wisconsin, on the 23rd day of September, between one and two o'clock P. M., and by him mailed to us here.

We refuse to join you as therein requested in the selection of a new scaler, for the reason that Albert B. Lawton, who is and has been scaling the logs in accordance with the contract, is scaling fairly, of which fact we have full evidence and proof. Until you can prove under the contract of July 12, 1887, that Albert B. Lawton's scaling is unfair and improper, he will continue to scale the logs as heretofore.

STREET, CHATFIELD & CO."

The answer states that the Nathan Pierce mentioned was the agent of defendants in error in charge of sawing the logs.

The answer then states that defendants in error, against the wish and protest of the plaintiffs in error, thereafter retained the said Lawton at the labor of scaling said logs and always refused to recognize any right in plaintiffs in error to have the mill scale of said logs made by any other scaler, and that plaintiffs in error delivered, prior to the commencement of the action, at the place specified in the contract, logs under the contract, which fairly and honestly scaled by the Doyle rule at the mill, would have scaled over 5,000,000 feet of merchantable lumber, after making proper allowance for shakes, rot and other defects. The answer also charges that a great many of the logs delivered under the contract were, through the carelessness and negligence of the defendants in error, lost in transit between the dividing piers (the place of delivery) and the mill where they were sawed, and that many of the logs delivered were sawed without being scaled at all at the mill, and that those that were sawed were unfairly and improperly scaled by the said Lawton in this; that instead of making proper allowances for shakes, rot and other defects that would render the lumber product unmerchantable, he constantly made allowances for such defects grossly in excess of such as would fairly and honestly have been proper.

The answer, for a second defense, charges fraud on the part of defendants in error in the way of false representations made by them regarding Lawton's honesty and competency as a scaler, resulting in obtaining the assent of plaintiffs in error to his making the scale of the logs to be made at the mill, and charges that such representations were known to be false by defendants in error when they made them. It also charges that Lawton was at the time said representations were made, and remained, during the delivery of said logs, the corrupt and pliant tool of the defendants in error, ready always, in consideration of the employment obtained for him by them in the character of scaler, to observe their wishes and follow their suggestions in any course by which their interests would be aggrandized, and it is charged that defendants in error well knew, when they made the representations complained of regarding Lawton, that, if he was permitted to scale the logs at the mill he would make a fraudulent scale thereof in their interest and thereby afford them apparent grounds for a recovery from plaintiffs in error of a portion of the money paid them at the time the contract for the purchase of the logs was made, and the answer charges an understanding between Lawton and the defendants in error to the effect that if Lawton secured the employment as scaler of the logs at the mill he would report such a scale as would enable the defendants in error to cheat and defraud the plaintiffs in

error of a large sum of money by making a case for recovery of a portion of the advance payments made by defendants in error at the time of the purchase of said logs.

The answer then substantially reiterates the facts pleaded in the first defense with reference to the discovery of Lawton's unfair scaling and the measures taken by the plaintiffs in error to verify their suspicions, the notice they gave defendants in error and the reply thereto, and the refusal of defendants in error to consent to Lawton's discharge or the substitution of or the resort to any steps whatever to obtain another scaler, all against the protest and objection of plaintiffs in error, and charges that Lawton made a fraudulent scale of the logs at the mill in the interest of defendants in error, with the view of enabling them to recover a large part of the money they had advanced for said logs. By reason of all of which the plaintiffs in error, in their answer, claim the deficiency in quantity which constitutes the basis of this action, was fraudently caused.

The answer than states a counterclaim, alleging the delivery of logs enough under the contract, to defendants in error, which, fairly and honestly scaled by the Doyle rule, would have scaled 5,000,000 feet of merchantable lumber after making proper deductions for shakes, rot and other defects, for which they would have been entitled to be paid at the close of the sawing season of 1889, in addition to the sums originally advanced for said logs, the sum of $1,389.41, no part of which, they alleged, had ever been paid, and judgment for that amount was demanded with interest.

Defendants in error by their reply, admit that they stated to the plaintiffs in error at the time of making the contract that they believed Albert B. Lawton, named therein, to be an honest, competent and disinterested scaler. Also that the plaintiffs in error caused Messenett, mentioned in the answer, to scale or pretend to scale the logs at the mill, and also that the correspondence set out in the answer took place between the parties, and that Nathan Pierce named in the answer was the agent for defendants in error at the time. They deny all other allegations of the answer.

The case was tried on the issues so made.

Defendants in error (plaintiffs below) proved by Albert B. Lawton, the person mentioned in the contract, "that he scaled with the Doyle rule, at the mill where they were sawed, of all the logs mentioned in the complaint that were sawed up to the close of the sawing season of 1889, 16,273 pieces of logs, and that the logs so scaled contained 3,633,890 feet, and in 1890, prior to the commencement of the action, 81 additional logs which contained 19,575 feet, and that in making such scale he made proper allowance for

shakes, rot and other defects in the logs that would render the lumber product thereof unmerchantable;" fol. 25, Record.

They also proved by Chas. A. Street that the scaler's wages for scaling the logs in the mill amounted to $128.84 and that that amount was paid by them.

It was then admitted by plaintiffs in error that defendants in error had paid for them $178.70, back toll and river charges.

Upon these proofs defendants in error rested their case.

The defendants (plaintiffs in error) then offered evidence in support of the allegations of their answer, which consisted

1st:—Of the testimony of Wallace P. Cook (one of them) to the effect that he was led to go to the mill where the logs were being sawed and investigate Lawton's scaling, by the reports furnished by Lawton each night, after each day's scale was made, which upon comparison with the scale made in the woods of the same marks of logs, showed an average number of feet to the log *greatly less than that shown by the wood scale*. He gives the figures demonstrating this.

His testimony on this point is found in folios 26-7, Record.

Another reason given by the witness for investigating Lawton's scale was that he went into the mill and saw Lawton sitting down and letting the logs go by him without putting his scale rule on them.

Another reason was he noticed, when logs, the ends of which had been "broomed", —that is, so worn away on their ends, by contact with rocks and other obstructions in the streams down which they were driven as to reduce, at the ends, the diameter of the log—came into the mill, that Lawton, instead of taking the *full* diameter of the log, hooked his scale rule on the end of the log in such a way as to take the reduced diameter, which resulted in his scaling the log as though its entire length was of its end diameter, and this notwithstanding the fact that in cutting the logs in the woods they were cut longer than the lengths required for lumber, so that the broomed ends could be cut off.

His testimony in these particulars is found commencing with the last question noted in folio 27, Record, and is as follows:—

Q. And you were comparing his report of his scale in the mill with the wood scale?

A. Yes sir; and other reasons were I went into the mill and saw him sitting down and letting the logs go by without putting his rule on them. Another reason was, logs that had been broomed—that is, the ends worn down by striking against obstructions in the river, and he would hook on to the end of the log, if the end had been worn off a couple of inches, and measure the timber in that way instead of try-

ing to get the actual diameter of the log.

Q. Hooked on to the log?

A. Put his rule on to where this broomed end was and not get the full diameter of the log.

Q. What do you mean by the broomed end of the log?

A. Logs having run down rapid rivers where there are rocks and timber for the logs to come in contact with, get broomed on the ends more or less, and in cutting them in the woods they are cut a little longer than the lengths required for lumber, so they can be trimmed off for that purpose, and where there is no lumber lost in the broomage, the logs should be scaled according to their diameter as put into the river in the woods.

Q. What effect would hooking his scale on the broomed end of the log have upon determining the quantity?

A. If it was broomed off, say, three inches smaller than it was cut, it would make three inches less in diameter—make a difference in size.

Q. You mean it would be equivalent to reducing the entire length of the log three inches in diameter, instead of one end?

A. Yes sir: fol. 28, Record.

The examination of the witness then continued as follows:

"Q. And what did you do then?

A. I sent a man prior to this to scale beside that man.

Q. What man did you send?

A. George Messenett:" last part of fol. 28, Record.

The witness then states in effect that he received reports from Messenett of his scale and he identifies Exhibits "A", "B", "C", "D", and "E",—p. p. 28-30, Record—as Messenett's reports. Upon getting these reports he caused the written notice of September 9, 1887, set out in the answer herein—folio 12, Record—to be given defendants in error. After receiving their reply (which is also set out in folio 12, of the Record) he always protested against Lawton's scaling: fols. 29-30, Record.

Lawton was then called by plaintiffs in error and identified Exhibits "F", "G", "H", "I", "J", and "K"—p. p. 30-33, Record—as the daily reports made by him to plaintiffs in error while Messenett was scaling the same logs by his side: fol. 31, Record.

The scaler Messenett was then called as a witness for plaintiffs in error and testified to the manner in which he made his scale and to the manner in which Lawton made his scale of the same logs: fol. 31-2-3, Record. The plaintiffs in error then produced testimony by the scalers who made the woods scale showing the whole number of the three marks of logs described in the complaint and the quantity of feet contained in them, as shown by the scale made of them in the

woods, the whole number so shown, after deducting the number of logs, namely, 1,014, constituting the 300,019 feet referred to in the contract sued on as having been sold and delivered prior to the date of such contract, being 16,811 and containing 5,332,339 feet; and it was testified that this result was arrived at after making allowances for all visible defects and imperfections in each log, according to the judgment of the scaler who scaled each mark of logs: fol. 33, Record.

George R. Arnold was then sworn as a witness for plaintiffs in error, who, after testifying as follows, to wit: "My occupation is that of assistant superintendent of the Marinette Saw Mill Company, which company is located at Marinette, Wisconsin, and its business is that of manufacturing lumber. The Marinette Saw Mill Company manufactured lumber for Street, Chatfield & Company during the years 1888 and 1889"—was asked by counsel for plaintiffs in error the following question:

Q. Who scaled the logs in that mill in front of the saw?"

This question being objected to on the ground that the same was immaterial, the court sustained the objection and excluded the answer, to which ruling of the court plaintiffs in error then and there duly excepted: fol. 34, Record.

The following question was then asked the witness by counsel for plaintiffs in error, to-wit: "Q. What was the difference in the lumber product actually sawed in the Marinette Saw Mill Co's mill out of those logs scaled by Lawton in front of the saw, between the product and his scale of the logs in front of the saw?"

This question was objected to on the ground that the same was immaterial. The Court sustained the objection and excluded the answer, to which ruling of the Court counsel for plaintiffs in error then and there duly excepted: fol. 34, Record.

The following question was then asked the witness by council for plaintiffs in error: "Q. What do you know of your own knowledge of the manner of Mr. Lawton's scaling those logs scaled by him in 1888 and 1889, in the Marinette Saw Mill Co.'s mill being sawed for Street, Chatfield & Co."?

This question was objected to by counsel for defendants in error on the ground that the same was immaterial, which objection—counsel for plaintiffs in error having, upon inquiry by the court, stated that the question did not relate to the logs in controversy in this suit—was then and there sustained by the court and the answer of the witness excluded, to which ruling of the court plaintiffs in error, by their counsel, then and there duly excepted: fols. 34-5, Record.

Plaintiffs in error then produced and offered in evidence

the disposition of Geo. W. Hanley taken in the case October 24, 1890, on behalf of plaintiffs in error, who, after testifying that he was the secretary of the Menominee River Boom Company and had been such since the 1st of January last, was asked by counsel for plaintiffs in error the following question, towit: "I wish to have you state, Mr. Hanley, what quantity of logs in the aggregate, made up of the following marks, viz.: One of them "C. O.", others double "T", so called, and others of "C. T. P.", has been scaled through the booms of the Menominee River Boom Co., or was scaled through those booms during the season of 1888 and up to the close of the sawing season of 1889?

This question was objected to by counsel for defendants in error, because it appeared in the cross-examination of witness, being part of the deposition, that he was not with the Menominee River Boom Co., in 1888 and 1889, and had no personal knowledge of the matters inquired of, and testified from reports made by scalers of the company, which objection the court then and there sustained, to which ruling of the court plaintiffs in error, by their counsel, then and there duly excepted: fols. 35-6, Record.

Defendants in error then gave rebutting evidence and the actual lumber product of the logs delivered, which were sawed, was given in evidence.

Both parties then rested their case: latter part of fol. 36, Record.

The court then, after a general statement of the case to the jury—fol. 37, Record—proceeded with its charge as follows:—

"I will ask you to give particular attention to the following clauses in the contract:

> 'All of the logs so delivered, as herein provided, 'shall be scaled by Doyle scale rule in the mill where 'sawed, by a good and competent scaler. Albert B. 'Lawton, who is now scaling at Ludington, Wells & 'Van Schaick's river mill, at Menominee, is to scale the 'logs, so long as he scales fairly, who shall make 'proper allowances for shakes, rot and other defects 'that will render the lumber product unmerchantable, 'If either of the parties to this contract shall at any 'time deem the scale as made by the scaler under the 'scaling instructions herein unfair or improper, up-'on good reason of such unfair or improper scaling, a 'new man may be selected who shall be agreeable to 'the parties hereto, who shall scale said logs as long 'as he scales fairly. In case any disagreement shall 'arise as to the fairness of any scaler's scale, and the 'parties hereto are unable to settle the same, then 'three disinterested persons shall be chosen at once

'and without delay, one by each party hereto, the two 'to choose the third, who shall decide as to such fair 'scaling; this contract to be taken as the basis for 'such test as to said scale.'

"You will observe, gentlemen, by the terms of these "clauses, that the parties by their agreement made Lawton "the scaler, and he was to scale all the logs at the mill, not "for one party to the contract, but for both, *and so long as he "honestly exercised his judgment both parties were absolutely "bound by his reports of scaling.* Neither party was author- "ized to set him aside without cause; he could, however, be "set aside and another substituted in his place at the in- "stance of either party, *that party showing, however, to the "other, evidence fairly indicating that Lawton was not scaling "fairly or according to the terms of the contract.* Neither "party had mere arbitrary right to say that Lawton should "scale no longer; that was as much a part of the contract as "anything else—I mean his selection as scaler. Neither "could dispense with his services without the consent of the "other unless it was fairly made to appear that Lawton was "incompetent or untrustworthy, *that he was purposely mak- "ing an incorrect scale*, and if it appeared to either party that "Lawton was not scaling according to the contract, that, if "capable, he was not honestly exercising his judgment, "that he was not acting impartially, the right existed to in- "form the other party to the contract of that fact. If that "was discovered *and a proper showing made to the other side* "and the other side objected to his removal, the subsequent "scaling of Lawton would have no binding force. *All the "defendants had to do to get rid of Lawton's scaling—the bind- "ing force of his scaling—was to present to the plaintiffs proofs "or facts fairly showing that Lawton was not doing his duty.* "Whenever such a showing was made it was the duty of "the plaintiffs at once to consent to the substitution of an- "other man, and if upon a proper showing they refused to "agree to such substitution, then they had no right to in- "sist upon the binding force thereafter of Lawton's scaling.

"The defendants claim to have become dissatisfied with "Lawton's action, and I will read to you the letter which has "already been read and commented upon by counsel:

'MESSRS. STREET, CHATFIELD & CO.

'GENTLEMEN: Take notice that I deem the scale 'now being made and heretofore made by Albert B. 'Lawton of the logs sold you by me by contract dated 'July 12, 1887, unfair and improper, and require that 'you join me in the selection of a new man to carry 'on the scaling of these logs in the manner provided 'by said contract.'

"*The defendants deemed the scaling of Lawton unfair. How*

"*unfair? In what? What evidence did they bring to the "plaintiffs of unfair scaling by Lawton?* There is nothing "in this letter of itself—*and I leave it to you to say whether "there was any other evidence but this—showing the plaintiffs "that Lawton was not doing his duty according to the terms of "the contract.* The letter simply says that the defendants "deem that Lawton is not doing his duty; that he is not "scaling according to the terms of the contract. "*Before "the plaintiffs could be required to consent to the removal of "Lawton and substitution of another it was necessary that "the plaintiffs should be informed by the defendants wherein "Lawton was not doing his duty as a scaler, and until the "the plaintiffs were furnished with facts which fairly showed "that Lawton was not doing his duty, the plaintiffs had the "right to say that they would stand by the contract, part of it "being that Lawton should do the scaling. As I have stated to "you before, neither party could get rid of Lawton without "showing to the satisfaction of the other that he was not scal-"ing according to the terms of the contract.* It is not necessary "to read the plaintiff's reply to this letter. They refused to "consent to the removal of Lawton. They refused to agree "to the substitution of another scaler. *On the statements of "the letter addressed by the defendants to the plaintiffs, the lat-"ter were authorized to decline to accede to the proposition.* What "evidence is there, other than you have in this letter ad-"dressed to the plaintiffs, that they, the plaintiffs, knew that "Lawton was not doing his duty, if indeed he was not doing "his duty? And what evidence have you—that is a question "strictly for the jury—that Lawton did not scale this lum-"ber according to the terms of this contract? *Bear in mind "what I have said already, that if he scaled there according to "his best judgment, and his judgment was now and then at "fault, the parties were bound by his scaling reports. The de-"fendants cannot escape from the binding force of those re-"ports without evidence supporting the charge of fraud."*

The parts of the charge above set forth in italics were excepted to by plaintiffs in error—fol. 45 to 47, inclusive, Record.

There was a verdict for defendants in error for the sum of $5,934.88.

Plaintiffs in error thereupon and before judgment was entered moved the court upon its minutes to set aside the verdict of the jury and for a new trial for errors committed by the court in excluding testimony offered by them, and in its construction of the contract sued on, and of the law of fraud in such cases—fol. 44-5, Record.

The motion was overruled by the court and exception taken to the ruling—fol. 45, case.

Judgment was entered for the defendants in error upon the verdict, amounting, damages and costs, to the sum of $6,099.58.

Plaintiffs in error thereupon procured the settlement of a Bill of Exceptions and removed the case into this court by writ of error.

SPECIFICATION OF ERRORS RELIED ON.

The errors relied on are the following:

First:—The ruling of the court excluding the witness George R. Arnold's answer to the following question, to-wit: "Q. Who scaled the logs in that mill in front of the saw?"—fol. 34, Record.

Second:—The ruling of the court in excluding the witness Arnold's answer to the following question to-wit: "Q. What was the difference in the lumber product actually sawed in the Marinette Saw Mill Co's mill out of those logs scaled by Lawton in front of the saw—between the product and his scale of the logs in front of the saw?"—fol. 34, Record.

Third:—The ruling of the court in excluding the witness Arnold's answer to the following question, to-wit: "Q. What do you know of your own knowledge of the manner of Mr. Lawton's scaling those logs scaled by him in 1888 and 1889 in the Marinette Saw Mill Co's mill being sawed for Street, Chatfield & Co?"—fol. 34, Record.

Fourth:—The ruling of the court in excluding the witness Hanley's answer to the following question, to-wit: "Q. I wish to have you state, Mr. Hanley, what quantity of logs in the aggregate made up of the following marks, viz.: one of them 'C. O.', others of double 'T' mark, so called, and others of 'C. T. P.', has been scaled through the booms of the Menominnee River Boom Company, or was scaled through those booms during the season of 1888 and up to the close of the sawing season of 1889?"—fol. 36, Record.

Fifth:—The italicized portions of the following part of the charge of the court to the jury, to-wit:

"I will ask you to give particular attention to the following clauses in the contract:

> 'All of the logs so delivered, as herein provided, 'shall be scaled by Doyle scale rule in the mill where 'sawed, by a good and competent scaler. Albert B. 'Lawton, who is now scaling at Ludington, Wells & 'Van Schaick's river mill, at Menominee, is to scale 'the logs, so long as he scales fairly, who shall make 'proper allowance for shakes, rot and other defects 'that will render the lumber product unmerchantable. 'If either of the parties to this contract shall at any 'time deem the scale, as made by the scaler under the 'scaling instructions herein unfair or improper, upon

'good reason of such unfair and improper scaling, a 'new man may be selected who shall be agreeable to 'the parties hereto, who shall scale said logs as long 'as he scales fairly. In case any disagreement shall 'arise as to the fairness of any scaler's scale, and the 'parties hereto are unable to settle the same, then 'three disinterested persons shall be chosen at once 'and without delay, one by each party hereto, the two 'to choose the third, who shall decide as to such fair 'scaling; this contract to be taken as the basis for such 'test as to said scale.'

"You will observe, gentlemen, by the terms of these "clauses, that the parties by their agreement made Lawton "the scaler, and he was to scale all of the logs at the mill, "not for one party to the contract, but for both, *and so long "as he honestly exercised his judgment both parties were abso- "lutely bound by his reports of scaling.* Neither party was "authorized to set him aside without cause; he could, how- "ever, be set aside and another substituted in his place at "the instance of either party, *that party showing, however, "to the other evidence fairly indicating that Lawton was not "scaling fairly or according to the terms of the contract.* "Neither party had mere arbitrary right to say that Law- "ton should scale no longer; that was as much a part of the "contract as anything else—I mean his selection as scaler. "Neither could dispense with his services without the con- "sent of the other unless it was fairly made to appear that "Lawton was incompetent or untrustworthy, *that he was "purposely making an incorrect scale*, and if it appeared to "either party that Lawton was not scaling according to the "contract, that, if capable, he was not honestly exercising "his judgment, that he was not acting impartially, the right "existed to inform the other party to the contract of that "fact. If that was discovered *and a proper showing made to "the other side* and the other side objected to his removal, "the subsequent scaling of Lawton would have no binding "force. *All the defendants had to do to get rid of Lawton's "scaling—the binding force of his scaling—was to present to the "plaintiffs proofs or facts fairly showing that Lawton was not "doing his duty.* Whenever such a showing was made it "was the duty of the plaintiffs at once to consent to the "substitution of another man, and if upon a proper showing "they refused to agree to such substitution, then they had "no right to insist upon the binding force thereafter of "Lawton's scaling.

"The defendants claim to have become dissatisfied with "Lawton's action, and I will read to you the letter which "has already been read and commented upon by counsel:

'Messrs. Street, Chatfield & Co.

'Gentlemen: Take notice that I deem the scale 'now being made and heretofore made by Albert B. 'Lawton of the logs sold you by me by contract dated 'July 12th, 1887, unfair and improper, and require 'that you join me in the selection of a new man to 'carry on the scaling of these logs in the manner pro-'vided by said contract.'

"*The defendants deemed the scaling of Lawton unfair.* "*How unfair? In what? What evidence did they bring to* "*the plaintiffs of unfair scaling by Lawton?* There is "nothing in this letter of itself—*and I leave it to you to say* "*whether there was any other evidence but this—showing the* "*plaintiffs that Lawton was not doing his duty according to* "*the terms of the contract.* The letter simply says that the "defendants deem that Lawton is not doing his duty; that "he is not scaling according to the terms of the contract. "*Before the plaintiffs could be required to consent to the re-* "*moval of Lawton and substitution of another it was necessary* "*that the plaintiffs should be informed by the defendants where-* "*in Lawton was not doing his duty as a scaler, and until the* "*plaintiffs were furnished with facts which fairly showed that* "*Lawton was not doing his duty, the plaintiffs had the right* "*to say that they would stand by the contract, part of it being* "*that Lawton should do the scaling. As I have stated to you* "*before, neither party could get rid of Lawton without showing* "*to the satisfaction of the other that he was not scaling ac-* "*cording to the terms of the contract.* It is not necessary to "read the plaintiff's reply to this letter. They refused to "consent to the removal of Lawton. They refused to agree "to the substitution of another scaler. *On the statements of* "*the letter addressed by the defendants to the plaintiffs the latter* "*were authorized to decline to accede to the proposition.* What "evidence is there, other than you have in this letter ad-"dressed to the plaintiffs, that they, the plaintiffs, knew "that Lawton was not doing his duty, if indeed he was not "doing his duty? And what evidence have you—that is a "question strictly for the jury—that Lawton did not scale "this lumber according to the terms of the contract? *Bear* "*in mind what I have said already, that if he scaled there ac-* "*cording to his best judgment, and his judgment was now and* "*then at fault, the parties were bound by his scaling reports.* "*The defendants cannot escape from the binding force of those* "*reports without evidence supporting the charge of fraud.*"

POINTS AND AUTHORITIES.

As to the First Three Assignments of Error.

Plaintiffs in error charge in their answer that the scaler, Lawton, was, when he was falsely represented to them by defendants in error to be a fair, honest, competent and dis-

interested scaler, and thereafter continued

> "the corrupt and pliant tool of the plaintiffs always "ready, in consideration of the employment obtained "for him by the plaintiffs in the character of scaler, "to observe their wishes and follow their suggestions "in any course by which the interests of the plaintiffs "would be aggrandized:" Fol. 14, Record.

Plaintiffs in error had submitted evidence tending to show the unfair, improper and dishonest scale made by Lawton *of the logs in question*—the testimony of Wallace P. Cook and Messenet—and then called the witness Arnold to support the charge in their answer above quoted to bring the case within the rule that, in cases of fraud

> "similar fraudulent acts are admissable, if committed "at or about the same time, and when the same mo- "tive may reasonably be supposed to exist, with a "view to establish the intent of the defendant in re- "spect to the matters charged against him in the "declaration.":

Castle et al v. Bullard, 23 How (U. S.) 172; *Lincoln v. Claffin*, 7 Wall., 132; *Butler v. Watkins et al.*, 13 Wall., 456; *Cary v. Hotaling*, 1 Hill, 317; *Hall v. Naylor*, 18 N. Y., 588; *Raleigh v. Bigelow*, 12 Pick., 307.

Arnold testified that during the years 1888 and 1889—the years in which the logs in question were being sawed (and scaled by Lawton) in Ludington, Wells & Van Schaik's River Mill on the Menominee River—he was assistant superintendent of another mill company on the same river, viz.: the Marinette Saw Mill Company, and that his company manufactured lumber for defendants in error during those years: Last clause of fol. 33, Record. He was then asked the three questions ruled out as immaterial and upon which error is assigned.

These questions tended to show

1st: That the scale of logs being sawed by his company for defendants in error, made in front of the saw, i. e., as they came into the mill to be sawed, was made by Lawton;

2nd: The difference between the quantity of lumber in these logs *as shown by Lawton's scale*, and the *actual* quantity of lumber *produced by sawing the same logs*, and

3rd: The witness' own knowledge of the *manner* of Lawton's scale of those logs.

Had he been permitted to answer the second of these questions it might have appeared therefrom that a variance existed between the quantity of lumber in the logs, as shown by Lawton's scale of them before they were sawed, and the actual quantity of lumber sawed from the same logs, too gross to be accounted for on any honest hypothesis. This, of itself, would tend to support the claim of the plaint-

iffs in error that Lawton was at least an unfair or improper scaler—*Ortman v. Green*, 26 Mich., 209—at least in log transactions with which his alleged patrons, defendants in error, were connected, and the question of motive, the *quo animo*, could then be gone into when it might have appeared that "the patrons" were to pay the Marinette Saw Mill Company for sawing their logs a price per thousand feet *on his scale*, in which case an *under* scale would benefit them by reducing, *pro tanto*, their saw bill, or it might have appeared that "the patrons" had bought *those* logs on the same kind of a contract under which they obtained these of plaintiffs in error, to be ultimately settled for *on Lawton's scale*, in which case Lawton may have been practicing, and for the same purpose, the same dishonest course the jury found him guilty of in this case, viz.: making a fraudulent scale in the interest of the same patrons.

Had the witness Arnold been permitted to answer the third of these questions, to tell what personal knowledge he had of the *manner* in which Lawton scaled the logs sawed by witness' company for defendants in error in 1888 and 1889, it might have appeared that he scaled them at least as outrageously as he did these; "sitting down and letting logs go by without putting his rule on:" last clause, fol. 27, Record; "hook on to end of the (broomed) log, if the end had been been worn off a couple of inches, and measure the timber in that way instead of trying to get the actual diameter of the log:" first clause, fol. 28, Record. Had these or other equally material facts been elicited from Arnold, inquiry as to the motive, which could not precede them, could then have followed.

In order to recover anything in this case in excess of $64.42 (one half of the scaler's wages) and $178.70 (the amount paid for tolls) defendants in error had to show, by a scale of the logs made by Lawton with the Doyle rule in the mill where they were sawed, that they contained a less quantity of lumber than the quantity shown by the scale made of the same logs in the woods where they were cut. This they undertook to do but rested that part of their case *entirely on Lawton's testimony in support of his scale:* fol. 25, Record. As the case stood when they rested, defendants in error were entitled to recover, *as for an over-payment on the contract*, the amount sued for, viz.: $13,220.88, besides $243.12 for scaler's wages and tolls. They had a verdict however for but $5,943.88, $243.12 of which must have been for the undisputed items for tolls and scaler's wages, the balance, viz.: $5,691.76, being, necessarily, on the over-payment claim, a sum less by $7,529.12 than they should have recovered *on the basis of Lawton's scale*.

The inference is infallible that the jury discredited Law-

ton's scale *to that extent*. By not permitting the witness Arnold to answer the questions asked him and ruled out as immaterial, plaintiffs in error were deprived of evidence that might have influenced the jury to disregard *entirely*, instead of *partially*, Lawton's scale of the logs in question and they might have had a verdict. No one can say what affect the jury would have given testimony that might, even more potently than that received, have impeached Lawton for dishonesty as a scaler where such dishonesty benefited his co-conspirators.

The ground on which these questions, or at least the third one, were ruled immaterial was that they "did not relate to the logs in controversy in this suit:" see ruling on third question, fol. 54, Record. The same objection was made to similar questions in *Castle et al v. Bullard, Lincoln v. Clafflin, Butler v. Watkins*, and *Cary v. Hotaling*, supra, and overruled.

As to the Fourth Assignment of Error.

Plaintiffs in error, by the contract, were "to deliver the logs hereinbefore described, at the Menominee River Manufacturing Company's boom in the Menominee River above the dividing piers": last clause fol. 7, Record. Defendants in error were then to "attend to the delivery of the logs by the boom company to the mill where sawed": first clause fol. 10, Record.

The deposition of Mr. Hanley, the secretary of the boom company, was taken at the instance of plaintiffs in error and offered in evidence and, his official relation to the company being established, he was asked the following question by counsel for plaintiffs in error:

> "I wish to have you state, Mr. Hanley, what quan-
> "tity of logs, in the aggregate, made up of the fol-
> "lowing marks, viz: one of them 'C. O.,' others of
> "double T mark, so called, and others of 'C. T. P.,'
> "has been scaled through the booms of the Menomi-
> "nee River Boom Company, or was scaled through
> "those booms during the season of 1888 and up to
> "the close of the sawing season of 1889."

The court excluded the answer to this question "because it appeared in the cross-examination of the witness that he was not with the Boom Company in 1888 and 1889 and had no personal knowledge of the matters inquired of and testified *from reports made by scalers of the company*." Plaintiffs in error preserved an exception to the ruling: fol. 36, Record.

That it was proper for plaintiffs in error to show, in a competent manner, in order to still further discredit Lawton's scale of these logs, and also to prove their counterclaim, that they were scaled by the Boom Company as they passed through its booms, and the amount of that scale,

is not disputed. That it was competent to show this scale by the secretary of the company, testifying from the reports of the Company's scalers was determined, it is conceived—at least in principle—in *Gardiner et al. v. Wilber et al.*, 75 Wis. 601—another case of fraudulent scale quite like this in some of its features—where a mill scale of logs was allowed to be shown to impeach an alleged prior fraudulent scale made of the same logs by a lumber inspector.

> "The direct proof of this (the mill scale) was entries "of the mill scale of one Chase, made daily from "Chase's figures, by Mr. Sutherland (the mill owner) "in his mill books:" in statement of case, p. 602.

The scaler, Chase, was not examined. The court say upon the subject—p. 604—

> "The original figures made by the scaler were not "produced, but such scale was entered daily, just as "the scaler made it, by Mr. Sutherland in his mill "book. Such entries were received as evidence tend- "ing to show the quantity of lumber cut from the "logs. It is claimed they were incompetent. The "amount of sawing done for the plaintiffs by Mr. "Sutherland was ascertained from the figures con- "tained in these entries, and the plaintiffs indorsed "their accuracy by paying for sawing the amount of "lumber which they indicated. There was also con- "siderable other proof of their accuracy. Under "these circumstances, we think such entries were "competent testimony."

If the *entries* made in the mill book, *by another than the scaler*, of the scaler's *original* figures, were competent, his original figures or scale reports, shown to be such by the same mill owner who made the book entries, would, it would seem, be as competent, and that is what Mr. Hanley in his deposition testified to in this case—the scaler's reports; see ruling excluding his answer, fol. 36, Record. It is true, in the case cited, importance was given to the fact that

> "there was considerable other proof of their (the "scaler's figures) accuracy" such as the payment on

them, by the plaintiffs, of the saw bill, and estimates of the logs made by lumber experts etc., but so there was here—the woods-scale and the actual lumber product of the logs. Had Mr. Hanley been permitted to testify to the figures of his company's scaler's reports, those figures might have still further discredited Lawton's scale and confirmed the correctness of the woods-scale upon which the advances were made and might have supported the allegations of the counterclaim

> "that the defendants, prior to the close of the saw-

"ing season of 1889, dellvered to the plaintiffs at the "Menominee River Manufacturing Company's booms "above the dividing piers in the Menominee River "logs under said contract, which, taken to the mill "and fairly and honestly scaled by the Doyle rule, "would have scaled 5,000,000 feet of merchantable "lumber, after making proper deductions for shakes, "rot and other defects, for which the plaintiffs would "have been liable to pay these defendants under said "contract at the close of said season, in addition to "the sums theretofore paid by the plaintiffs on said "contract, the sum of $1,389.41."

In *Peterson v. Anderson*, 44 Mich., 441, a boom scale and its amount was offered to be proven by the secretary of the boom company, but the trial court ruled him incompetent. The supreme court ruled him competent. It said p. 433—

"It was admitted that the witness under examina- "tion, who was the secretary of the boom company, "did not make the scale, and the ruling seems to "have been based on that circumstance. But it was "not important who made it. The material consid- "eration was whether it was in fact the boom com- "pany scale and the one the parties acted on as suffi- "cient for their purpose, if such was the case, and it "was part of the offer to produce that scale."

Supposably the Boom Company's scale would tend to show the contents in lumber, of these logs, and constitute legitimate data for comparison with Lawton's scale. If the boom scale could not be used except upon production of each scaler who participated in making it, to verify his individual work, there would often result a failure of justice, for the vast traffic of such companies, handling as they have to in streams like the Menominee River, from three to five hundred million feet of logs annually, divided into a large number of marks and making a separate scale of the logs of each mark, with scaler's coming and going constantly, renders it substantially impossible to procure other evidence of the scale than the reports made to the company by its scalers and kept as a part of the records of its office. In *Smith v. Kelly*, 43 Mich., 390, the supreme court of Michigan put it this way—p. 392—

"In the multiplicity of work done by boom com- "panies, it would be unreasonable to suppose it would "always be practicable to show how every scale of "logs or parcel of logs was made, and for such pur- "poses the necessity of having different persons en- "gaged in measuring, tallying and entering results "would make it impossible for any one to know

"whether the rest made the true tallies or entries."

As to the Fifth, Seventh and Fifteenth Assignments of Error.

These errors are assigned upon the following italicized portions of the charge to the jury, to wit:—Excepted to by the First, Third and Eleventh Exceptions to the Charge, p. p. 26, 27, Record—

> "You will observe, gentlemen, * * * that the "parties by their agreement made Lawton the scaler, "and he was to scale all of the logs at the mill, not "for one party to the contract, but for both, *and so "long as he honestly exercised his judgment both parties "were absolutely bound by his reports of scaling.*" (Fol. "38, Record). * * * Neither could dispense with "his services with out the consent of the other unless "it was fairly made to appear that Lawton was "incompetent or untrustworthy, *that he was purposely "making an incorrect scale.*" (Fol. 39, Record) * * "*Bear in mind what I have said already, that if he "scaled there according to his best judgment, and his "judgment was now and then at fault, the parties were "bound by his scaling reports. The defendants cannot "escape from the binding force of those reports without "evidence supporting the charge of fraud.*"

Now, the *contract* provided that

> "If *either* of the parties to this contract shall at any "time *deem* the scale as made by the scaler under the "scaling instructions herein unfair or improper, *upon "good reason of such unfair and improper scaling*, a new "man may be selected who shall be agreeable to the "parties hereto, who shall scale said logs as long as "he scales fairly."

The *contract*, in other words, makes the *right* to have Lawton discharged at any time depend upon whether either party should, *upon good reason*, deem his scale *in fact* unfair or improper.

The *charge* makes the right depend upon whether Lawton *dishonestly* made his scale unfair or improper. "So long as he *honestly* exercised his judgment *both* parties were *absolutely bound by his reports* of scaling" and "Neither could dispense with his services * * * unless it was fairly made to appear * * * that he was *purposely* making an *incorrect* scale" and "*Bear in mind what I have said already, that if he scaled there according to his best judgment, and his judgment was now and then at fault, the parties were bound by his scaling reports. The defendants cannot escape from the binding force of those reports without evidence supporting the charge of fraud,*" is the language.

The plaintiffs in error were entitled, outside of mere errors of judgment, to an absolutely "fair and proper" scale *in fact* at the hands of Lawton. A scale made by him "sitting down and letting logs go by without putting his rule on" or by hooking his scale-rule "on to the end of the (broomed) log, if the end had been worn off a couple of inches and measure the timber that way instead of trying to get the actual diameter of the log" was obviously "unfair and improper" but not *necessarily* tainted with a *dishonest* purpose, for the first of these faults may have occurred through laziness or the resulting torpor of dissipation and the last through lack of comprehension of the effect, but the charge left the jury no choice but to find against plaintiffs in error unless they found Lawton's scale *purposely* incorrect, *intentionally* dishonest, for they were told in so many words "the defendants (plaintiffs in error) cannot escape from the binding force of those reports (Lawton's) without evidence *supporting the charge of fraud.*"

Of course neither party could complain of mere errors of judgment, but such errors could only occur under this contract in making "allowances for shakes, rot and other defects that will render the lumber product unmerchantable," for, on this subject, the supreme court of Wisconsin have said in *Early v. The Chippeway Logging Co.*, 68 Wis., 112-119 —"This is clearly a matter of judgment as to which two men of equal competency and honesty might disagree;" but to scale moving logs, sitting down, letting them go by without putting the rule on, and the broomed logs by putting the rule on so as to get only the reduced diameter of the end of the logs, were acts manifestly more serious than errors of judgment; were indeed, to say the least, acts of neglect and carelessness which, of themselves, would be sufficient in the absence of a fraudulent or dishonest purpose, to impeach Lawton's scale: *Early v. The Chippeway Logging Co.*, supra, p. 119 where it is said on the subject

> "The contract having provided for a scaler to whose "judgment these matters were to be submitted in the "first instance, and whose judgment, unless clearly "impeached, should bind the parties, his judgment "must bind the parties, unless it be shown by im-"partial tests that his judgment was warped by prej-"udice, *or that by reason of neglect or carelessness* he "failed to exercise an honest judgment in the matter "intrusted to him."

The charge upon this part of the case eliminated from the jury's consideration all but an *intentionally* dishonest scale by Lawton, and to this circumstance alone may be attributed the fact that they found any verdict at all against the plaintiffs in error, for they might have found that he

was actuated by no dishonest or fraudulent purpose in scaling while sitting down and without using his rule and in scaling the broomed logs as he did, and based their verdict on a view of his scale involving this hypothesis, discarding the balance of his scale as fraudulent.

Had they been charged, as it is conceived they should have been, that they might discard Lawton's scale for neglect or carelessness, as well as for dishonesty, they might have discarded it *in toto* and plaintiffs in error might have had a verdict.

As to the Sixth, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth and Sixteenth Assignments of Error.

These errors are assigned upon the following italicized portions of the charge to the jury, towit: —excepted to by the Second, Fourth, Fifth, Sixth, Seventh, Eighth Ninth, Tenth and Twelfth Exceptions to the charge, p. p. 26, 27, Record—

"You will observe, gentlemen, by the terms of these "clauses, (just quoted from the contract) that the "parties by their agreement made Lawton the scaler, "and he was to scale all of the logs at the mill, not "for one party to the contract, but for both, and so "long as he honestly exercised his judgment both "parties were absolutely bound by his reports of "scaling. Neither party was authorized to set him "aside without cause; he could, however, be set aside "and another substituted in his place at the instance "of either party, *that party showing, however, to the "other evidence fairly indicating that Lawton was not "scaling fairly or according to the terms of the contract.* "Neither party had mere arbitrary right to say that "Lawton should scale no longer; that was as much a "part of the contract as anything else—I mean his "selection as scaler. Neither could dispense with his "services without the consent of the other unless it "was fairly made to appear that Lawton was incom- "petent or untrustworthy, that he was purposely mak- "ing an incorrect scale, and if it appeared to either "party that Lawton was not scaling according to the "contract, that, if capable, he was not honestly exer- "cising his judgment, that he was not acting impar- "tially, the right existed to inform the other party to "the contract of that fact. If that was discovered *and "a proper showing made to the other side* and the other "side objected to his removal, the subsequent scaling "of Lawton would have no binding force. *All the "defendants had to do to get rid of Lawton's scaling— "the binding force of his scaling—was to present to the "plaintiffs proofs or facts fairly showing that Lawton*

"*was not doing his duty.* Whenever such a showing "was made it was the duty of the plaintiffs at once to "consent to the substitution of another man, and if "upon a proper showing they refused to agree to such "substitution, then they had no right to insist upon the "binding force thereafter of Lawton's scaling.

"The defendants claim to have become dissatisfied "with Lawton's action, and I will read to you the let-"ter which has already been read and commented "upon by counsel:

'Messrs. Street, Chatfield & Co.

'Gentlemen:—Take notice that I deem the 'scale now being made and heretofore made by 'Albert B. Lawton of the logs sold you by me by 'contract dated July 12th, 1887, unfair and im-'proper, and require that you join me in the 'selection of a new man to carry on the scaling of 'these logs in the manner provided by said con-'tract.'

"*The defendants deemed the scaling of Lawton unfair.* "*How unfair? In what? What evidence did they* "*bring to the plaintiffs of unfair scaling by Lawton?* "There is nothing in this letter of itself—*and I leave* "*it to you to say whether there was any other evidence* "*but this—showing the plaintiffs that Lawton was not* "*doing his duty according to the terms of the contract.* "The letter simply says that the defendants deem "that Lawton is not doing his duty; that he is not "scaling according to the terms of the contract. *Be-*"*fore the plaintiffs could be required to consent to the* "*removal of Lawton and substitution of another it was* "*necessary that the plaintiffs should be informed by the* "*defendants wherein Lawton was not doing his duty as* "*a scaler, and until the plaintiffs were furnished with* "*facts which fairly showed that Lawton was not doing* "*his duty the plaintiffs had the right to say that they* "*would stand by the contract, part of it being that Law-*"*ton should do the scaling. As I have stated to you be-*"*fore, neither party could get rid of Lawton without* "*showing to the satisfaction of the other that he was not* "*scaling according to the terms of the contract.* It is "not necessary to read the plaintiffs' reply to this "letter. They refused to consent to the removal of "Lawton. They refused to agree to the substitution "of another scaler. *On the statements of the letter ad-*"*dressed by the defendants to the plaintiffs the latter* "*were authorized to decline to accede to the proposition.* "What evidence is there, other than you have in this "letter addressed to the plaintiffs, that they, the

"plaintiffs, knew that Lawton was not doing his duty,
"if indeed he was not doing his duty? And what
"evidence have you—that is a question strictly for
"the jury—that Lawton did not scale this lumber ac-
"cording to the terms of this contract.

Here was a construction of the contract not only unwarranted by any of its provisions but contrary to its most obvious intent and purpose, one that reads into it words which it is manifest were, *ex industria*, omitted.

What was the situation when the contract was made? Plaintiffs in error had a lot of logs which the woods scale showed contained 5,352,747 feet. Defendants in error wanted these logs and to get them agreed to advance plaintiffs in error $53,367.38—$10.00 per thousand feet. A re-scale of the logs was to be made in the mill as a basis for final settlement.

Plaintiffs in error were induced to part with their logs only upon these terms.

It is manifest at once that the interest of the parties *could* be materially effected by the re-scale. The woods scale of the logs on which the advances were made was to remain the determining scale by which the aggregate price of the logs was to be ultimately ascertained in every event but one: nothing could perform that office or take its place except a *fair and proper* re-scale of the logs by the Doyle rule made in the mill where they might be sawed. If such re-scale was never made, the woods scale continued the *only* evidence of the number of feet ultimately to be paid for. This was the contract. Plaintiffs in error would naturally, under these circumstances, safeguard themselves against an unfair and improper re-scale of the logs in the mill. They consented to Lawton's making the re-scale "so long as he scales fairly," but by express provision they reserved the right to have another scaler substituted at any time they "upon good reason" deemed that Lawton was making an "unfair or improper scale."

The words "upon good reason" were certainly never intended by the parties to mean that the reasons should be such as the adversary party would consider good and such as would be satisfactory to him. The Court construed the clause as though it read "upon showing the other party reasons which such other party shall consider good and sufficient, which shall be satisfactory to such other party."

By what words does the contract require that the *reasons*, if they were good in fact—a judicial question—which either party might have for deeming Lawton's scale "unfair or improper" should be disclosed and seem good and satisfactory to the *adversary* party whose interest it would be *not* to assent to their sufficiency? If Lawton became a conspir-

ator with either, to defraud the other by making an "unfair or improper" scale, would the conspirator-party, whose interest was being conserved by the fraud, be likely to *fairly* and *judicially* consider the injured party's reasons, whatever they might be, for deeming the scale "unfair or improper?" If a conspiracy existed between Lawton and defendants in error by which he was to make an "unfair or improper" scale in their interest, of what use would it have been for plaintiffs in error to inform them that Lawton was making his scale of the logs in the mill sitting down and letting the logs pass him without putting his rule on, and by taking the artificial, instead of the right diameter of the broomed logs, and by making too great deductions for shakes, rot and other defects in the logs? If the construction which the court gave the contract in its charge to the jury is the correct one, it was within the power of defendants in error, in the case supposed, to defeat any demand for another scaler by saying to plaintiffs in error "your reasons do not seem *to us* good enough, or sufficient to entitle you under the contract to another scaler; they do not seem *to us* to make out a case of unfair or improper scaling." Did the parties intend by the language they used in framing these provisions to give this power to an adversary party? If so, they might as well have said that Lawton's scale should be absolutely binding upon each in any event, unless another scaler was selected *by mutual consent*, in which case the selection of another scaler could always be defeated by either party by withholding their consent to such a selection.

That it was the studied purpose of the parties not to give this power, but to reserve to each the power of *protection against it* is obviously the case, for the right existed whenever *either*—not both—should deem that an "unfair or improper" scale was being made, upon good reason therefor.

Whether the reasons were good or not would be a *judicial* question, for the contract does not make the *adversary* of the complaining party the judge of their sufficiency. If the reasons were communicated and assent to their sufficiency refused, such refusal would go for nothing as against a subsequent *judicial* determination that they *were* good and entitled the party complaining to a resort to the method contemplated by the contract for the substitution of another scaler in Lawton's place.

It is the master vice of the charge that its interpretation of the contract leaves the victim at the mercy of his adversary by making his right to have another scaler depend upon that adversary's *opinion* of his reasons, when the contract makes it depend upon the *judicial* question whether his reasons for the demand were in fact good or not. The jury

might have found, but for this part of the charge (*which took the question from them* and declared *as matter of law* that the Cooks never became entitled to a new scaler *because* they failed to inform their co-contractors *why* they deemed Lawton's scale unfair and improper,) that the reasons testified to by Mr. Cook as those which influenced him to demand another scaler in Lawton's place *were good in fact* and that, in consequence, Lawton should have been discharged and another scaler substituted, and this would have resulted, *ex necessitate legis*, in defeating the entire claim for over-payment without their having to consider the second defense to the action, viz.: the alleged conspiracy between Lawton and defendants in error to defraud the Cooks by a fraudulent scale, and the verdict would have been for plaintiffs in error.

If those parts of the charge were wrong which informed the jury that it was essential under the contract for a complaining party to present to the other, proofs or facts fairly showing that Lawton was not doing his duty and that until such a showing was made the other party could insist upon the binding force of Lawton's scaling and that neither party could get rid of Lawton *without showing to the satisfaction of the other* that he was not scaling according to the terms of the contract, then the notice served by plaintiffs in error upon their adversary—fol. 12, Record—was sufficient to initiate the proceeding contemplated by the contract as preliminary to the selection of another scaler and to cast upon that adversary the duty to accede to the proposition, viz.: to join in that proceeding, yet the court charged that

> "On the statements of the letter addressed by the "defendants to the plaintiffs, the latter were author- "ized to *decline* to accede to the proposition."

It is insisted for plaintiffs in error that no such showing (that stated by the court) was necessary, because (1) the contract, instead of requiring it, expressly excuses it by providing that it shall be enough

> "If *either* of the parties * * * shall, at any time, "*deem* the scale * * * unfair or improper, upon "good reason of such unfair or improper scaling"—

which should be interpreted as though the reading was, *in totidem verbis*,

> It shall be enough if *either* party shall, upon such "reason therefor as shall be *judicially* found sufficient, "at any time *deem* Lawton's scaling unfair or im- "proper"—and (2) the situation would not *necessarily* be *improved* by it because the notified party could still defeat a change of scalers by uncandidly denying that the proofs or facts presented fairly showed that Lawton was not doing his duty, and did not show *to their satisfaction* that he was

not scaling according to the contract, and that question would still have to be *judicially* determined before it could be known whether they did or not. The contract provides with reference to this question that

> "In case any disagreement shall arise as to the fair-
> "ness of any scaler's scale, and the parties hereto are
> "unable to settle the same, then three disinterested
> "persons shall be chosen at once and without delay,
> "one by each party hereto, the two to choose the third,
> "who shall decide as to such fair scaling; this contract
> "to be taken as the basis for such test as to said scale"

and this was the situation: Lawton was scaling. Plaintiffs in error, for reasons which the jury in this case, under the charge of the court that

> "The defendents cannot escape from the binding
> "force of these reports (Lawton's scaling reports)
> "without evidence supporting the charge of fraud"—
> "fol. 41, Record

found sufficient to impeach Lawton's scale *as a fraudulent one*, deemed Lawton's scaling unfair and improper and so notified defendants in error and required them to join in the selection of a new man "in the manner provided by the contract." To this notice and requirement defendants in error replied

> "We refuse to join you as * * * requested, in
> "the selection of a new scaler, for the reason that
> "Albert B. Lawton, who is and has been scaling the
> "logs in accordance with the contract, is scaling fairly,
> "of which fact we have full evidence and proof. *Until*
> "*you can prove* under the contract of July 12, 1887, that
> "Albert B. Lawton's scaling *is unfair and improper*,
> "he will continue to scale the logs *as heretofore*."

Here was a sharp disagreement over the fairness of Lawton's scale, and one party requested the other's co-operation to meet the anticipated emergency "as provided by the contract," viz: by joining and settling the question of the fairness of Lawton's scale themselves, or, failing that, by submitting it to the arbitrament of a board which the contract makes provision for choosing, all of which was preliminarily necessary to the choosing of another scaler. With the logs in their adversaries' possession and that reply in hand what could plaintiffs in error do? They were sharply informed that until *they* could *prove* that Lawton's scaling was unfair or improper he would continue scaling "as heretofore." Prove this to whom, and how? To them, of course, the beneficiaries of Lawton's fraudulent scale, and to their satisfaction. Holy writ wouldn't have done it; and how "as heretofore?" As fraudulently, of course. And that is what he did, and the jury so found for they discarded his scale

under a charge that permitted them to discard it *only* in case *they found it fraudulent*, for the court said to them, at the close of its charge on the first defense, all consideration of which it took from the jury,

> "The defendants cannot escape from the binding "force of those (Lawton's) reports *without evidence "supporting the charge of fraud.*" fol. 41, Record

and while charging on the second defense,

> "If you are satisfied that Lawton's scaling was "fraudulent, you will disregard his scaling reports "and reach a conclusion as best you can upon all the "evidence before you." fol. 42, Record.

The evidence of their having discarded his scale is that their verdict was only for $5934.88 when, on his scale, it could not have been less than $13,220.88.

But if a showing of reasons was, as the court charged, a condition precedent to a right in either party to the other's co-operation, in the first instance, in proceedings preliminary to the selection of a new scaler, the letter of defendants in error to plaintiffs in error declining the requested co-operation excused both prior and subsequent non-performance of that condition, because it declared new and non-contract conditions as the *only* ones which they, in any event, would treat as sufficient to impose upon them *any* duty to any co-operation in such proceedings, for by it they said to plaintiffs in error, in substance,

> "It is unimportant what *your* reasons are for deem- "ing Lawton's scale unfair or improper. We shall "refuse to join you in *any* proceedings looking to the "selection of a new scaler because the *fact* is Lawton "is scaling fairly and *we* have full evidence and proof "of that fact, and he will continue to scale the logs "just as he has been doing until *you* can prove to *us* "that his scaling is unfair and improper."

Now, unless they were strictly right in this position, it was a complete abrogation of the contract on their part, an assumption of rights not conferred by the contract, which relieved plaintiffs in error from all duty to make any further effort to procure a change of scalers, leaving them at the same time whatever rights they then had to such a change if their reasons for demanding it *were good in fact*.

These views are amply supported by principle and authority.

If a party who is entitled to the benefit of a condition dispense with it or prevent its performance, the opposite party is excused from proving a strict compliance: *Williams v. Bank of U. S.*, 2 Pet., 96; *Swain v. Seamans*, 9 Wall., 254.

Defendants in error could not be heard to say, after writ-

ing that letter, that their reason for refusing to join in proceedings looking to the selection of a new scaler was that plaintiffs in error did not, in their notice and demand, state any reasons for deeming Lawton's scale unfair and improper, *because that was not the reason expressed in their reply to the request*. Had it been, it is not to be presumed that the reasons relied on by plaintiffs in error for so deeming would have been withheld from them. The doctrine of estoppel by waiver clearly applies. "If a party, by waiver, has misled his antagonist, if he refrained from making objections known to him at a time when they might have been removed, and until after the possibility of such removal has ceased, he ought not to be permitted to raise the objection at all:" *Shutte v. Thompson*, 15 Wall., 151. That reply letter was a denial of all right in plaintiffs in error to the others' co-operation in proceedings preliminary to the selection of a new scaler *except in a case entirely strange to the contract*, and such denial, in analogy to the doctrine, in the law of insurance, that "denial of all responsibility by an insurer is a waiver of preliminary proofs, or upon one ground, of all other grounds"—*Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S., 696; *Taylor v. Merchants Fire Ins. Co.*, 9 How., 390—amounted to a waiver of any preliminary proof of unfair or improper scaling by Lawton. In *Benson v. Shotwell*, 103 Cal., 163 (37 Pac. Rep. 147) a party entitled under a contract to a good paper title of record to a piece of land, wrote his co-contractor, with reference to a break in the record title, as follows: "If you have the deed in your possession among the papers relating to the lot, please let me have it to show Mr. Drown, and if necessary, have it re-recorded." His co-contractor thereupon called upon him "with the deed in his hand and stated what it was, but did not open it or show it to defendant; that defendant asked him why he did not record it, and his reply was that he considered the original deed better than the record, but that he would give it to defendant, with the rest of the papers, on the delivery of the property; and that he thereupon took the deed away, did not record it, and had no further communication with defendant on the subject." On cross-examination the co-contractor admitted that he never proposed to do anything with the deed beyond delivering it to defendant when he should take the property. The court say

> "In view of the request contained in defendant's "letter, plaintiff's conduct must be considered as "amounting to a refusal to submit the deed for ex-"amination by counsel, or to have it recorded; and "his testimony that he did not 'decline' to put it on "record, or to allow defendant to do so is a mere con-

"clusion to which no weight can be attached."

Upon their request being refused plaintiffs in error could only rest the case where such refusal left it until the conspirators should attempt to gather the fruit of the conspiracy, which they did by the instant suit, the result of which (notwithstanding that under the contract, plaintiffs in error could not be called upon to restore one cent of the amount advanced them until the right was established by a "fair and proper" re-scale *of the logs*—not of the *lumber sawed from them* for there was no charge of fraud against *them* to authorize the woods-scale to be departed from in any case except in favor of a "fair and proper" re-scale *of the logs* in the mill where sawed, made by a good and competent scaler agreed upon or selected as required by the contract, which the jury found was never made) has been a judgment against them for the amount of the verdict and costs, when, as soon as it appeared, as it did by the verdict, that there had never been a "fair and proper" re-scale of the logs, they should have had judgment at least for dismissal of the action upon the merits, if not upon their counterclaim, and there should be not only a reversal but a direction for dismissal of the action upon the merits.

The exceptions to the charge, being taken at the same term at which the action was tried, though after judgment—fol. 45, Record—were taken in time. Read §914, R. S. U. S. with §2869, R. S. of Wis. 1878, and see *Lamaster v. Keeler*, 123 U. S. 388; *Nudd v. Burrows*, 91 U. S. 426; *Wayman v. Southard*, 10 Wheat. 1. §2869, R. S. of Wis. 1878, reads as follows:

"EXCEPTIONS, HOW TAKEN, ETC., IN JURY TRIALS. *Section* 2869. In any trial, by jury, if an exception be taken, it may be reduced to writing at the time, signed by the judge, without seal, and filed as part of the record; or it may be entered in the judge's minutes and afterwards settled by the judge separately, in like manner, or in a bill of exceptions. Ether party may, at any time before the close of the term at which the action is tried, except to any part of the judge's charge to the jury, not given with his express consent, with the same effect as if done at the trial before the jury retired;" S. & B.'s Anno. Ed. R. S. of Wis. 1878.

Counsel for plaintiffs in error had a right under §914, R. S. U. S. to rely on these provisions of the state statue and file the exceptions to the charge at any time during the term. Otherwise they would mislead him to the injury of his client.

W. H. WEBSTER,
Attorney for Plaintiffs in Error.

Office Supreme Court, U. S.
FILED.
APR 18 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 226.

WALLACE P. COOK ET AL., PLAINTIFFS IN ERROR,

vs.

CHARLES A. STREET ET AL., DEFENDANTS IN ERROR.

Brief for Plaintiffs in Error in Support of the Right to Have This Cause Heard and Determined on the Merits.

W. H. WEBSTER,
Attorney for Plaintiffs in Error.

APRIL 17, 1896.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 226.

WALLACE P. COOK ET AL., PLAINTIFFS IN ERROR,

vs.

CHARLES A. STREET ET AL., DEFENDANTS IN ERROR.

Brief for Plaintiffs in Error in Support of the Right to Have This Cause Heard and Determined on the Merits.

STATEMENT OF THE CASE.

Notwithstanding the writ of error in the case was returnable to the October term, 1891, of this Court, the transcript was not sent up from the trial court until April 20, 1893, a date subsequent to the end of the return term. The transcript was filed here on that date and the cause docketed as No. 1327 for the October term, 1892.

The transcript shows that all proceedings to remove the cause into this Court were seasonably had and perfected on the 17th day of November, 1890, nine days after the judgment was rendered. Plaintiffs in error could have done no more

than they did do in the way of observing rules and statutes relating to the right of review of the judgment they complain of, except to see to it that the clerk of the trial court performed a duty that only he could perform, viz., get the transcript into this Court before the end of the return term. This they did not do; but, as appears from the annexed affidavit of counsel for plaintiffs in error, filed herein this date, they directed the prompt and seasonable certification of the record to and docketing of the cause in this Court, paid all fees and gave all bonds required, and depended upon the clerk for the performance of his duties for the balance.

For reasons not known to plaintiffs in error, these duties were not performed. The letter of the clerk of the trial court to the clerk of this Court of April 18, 1893, in which he states, "The record was simply held back by direction of attorney for plaintiffs in error," is no evidence of the fact. Any clerk derelict in a similar way might say the same thing in excuse of his derelict act, and still the fact might be otherwise. It is enough to say here that the letter is no part of the record, an *ex parte* assertion of no force. If an issue was made to locate the fault, the clerk's evidence might be material; otherwise not.

Argument.

At the time the proceedings to have this judgment reviewed here were taken by plaintiffs in error, subdivision 1 of rule 9, United States Supreme Court rules, 1887, was in force, under which it had been decided and become doctrine that a writ of error becomes *functus officio* unless a return is made to it during the term to which it is returnable.

To the objection that this was the enforcement of an extremely technical rule this Court suggested resort to Congress for corrective legislation (*Edmonson vs. Bloomshire*, 7 Wall., 306; *Gillett vs. Bullard*, 20 *id.*, 574; *Peugh vs. Davis*, 110 U. S., 228). Evidently such resort was not made, and on January 26, 1891, before the time had expired for return to be made to this writ of error, this Court promulgated amendments to rule 9 by making it provide a means for enlarging the time for docketing the case and filing the record in this Court *after* the return term of the writ. It is unimportant to state in detail what the means so provided were, because they were not resorted to here. The fact is referred to as showing that the Court was conscious of the hardship of the existing rule, and willing, if not anxious, to open a door for escape from it, Congress not having done so.

At the same time the Court promulgated an amendment to sub. 4 of rule 9, rules of 1887, by providing that the *defendant* in error might, at *any* time after the time in which plaintiff in error is required by the rule so to do, have the case docketed and the record filed in this Court and heard on the merits.

These amendments materially altered existing rules, and since they evince, as it is conceived they do, a purpose on the part of the Court to no longer be governed by the previously prevailing doctrine that the Court *could not* relieve parties from defaults occurring under the old rules, it is hoped for them that the Court will, under the amended ones, assert the power used by all other courts, so far as known, in the interest of clients innocent *in fact* of the *legal* wrong involved in defaults of this character, of relieving against their effect.

Certainly the effect of these amendments to rule 9 is to remove the idea that failure to comply with the rule is jurisdictional, for the Court can neither take nor divest itself of jurisdiction by rule. If not jurisdictional, it is discretionary; and since the injury of such defaults falls upon parties not in fact blamable, and especially since, as here, the defendants in error do not claim the default, but have filed a brief and submitted the case on the merits, it is submitted to the Court that the default is waived by the party in whose special interest the rule was created, and the case thereby saved for determination on the merits.

A text-writer on Fed. Pr.—Foster—notes the doctrine under the original rule 9, and remarks, p. 1058, vol. 2: "Whether the amendments to the rules change the practice in any respect has not yet been decided."

The Court's attention is called to the case of *Edwards vs. United States*, 102 U. S., 575, 577, upon the question of the effect to be given a motion by defendant in error to dismiss under the rule in question, delayed until a new writ is barred by lapse of time; see last clause of opinion; also to the case of *United States vs. Vigil*, 10 Wall., 423, as a case where a motion to dismiss under this rule was denied, although the record was not filed until, as here, two years had elapsed after the end of the term at which the writ was returnable.

The Court's attention is also asked to the affidavit of counsel for plaintiffs in error, filed herein April 17 instant, printed as an appendix to this brief.

W. H. WEBSTER,
Attorney for Plaintiffs in Error.

APRIL 17, 1896.

IN THE SUPREME COURT OF THE UNITED STATES.

WALLACE P. COOK *et al., Plaintiffs in Error,* *vs.* CHARLES A. STREET *et al., Defendants in Error.*	No. 226. October Term, 1895.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

W. H. Webster, being first duly sworn, deposes on oath as follows:

I have had sole charge of this case for plaintiffs in error, from its inception until the present time, as their counsel. I have always supposed that this case was docketed in this Court and the record filed in the office of the clerk of this Court within the time required by the rules of this Court therefor and know of no cause why the same was not done, and the reason of the failure of the clerk of the circuit court for the eastern district of Wisconsin to certify the record herein for filing in this Court within the time required by rule 9 of the rules of this Court is not known to affiant; that upon the settlement and filing of the bill of exceptions in this case in the court below and perfection of the appeal herein affiant directed the clerk of that court to promptly certify and forward for filing and docketing in this Court the record in this case and the case itself, and why there was any delay in doing so after such directions were given said clerk is a matter not known to affiant; that after the bill of exceptions was filed below herein and the citation upon the writ of error herein issued everything was done on the part of plaintiffs in error necessary to be done in order to en-

title them to have the cause docketed and the record filed in this Court within the time required by rule 9 of this Court, except that affiant, further than to explicitly direct the clerk below to promptly forward the record and have the same filed in this Court and the cause docketed here within the time required by the rule, took no other steps to see that this was done, relying upon the directions so given in that behalf as sufficient.

W. H. WEBSTER.

Subscribed and sworn to before me on this 17th day of April, 1896.

[SEAL.] JAMES H. MCKENNEY,
Clerk Supreme Court United States.

[Endorsed:] U. S. Supreme Ct. Wallace P. Cook *et al.*, pl'ffs in error, *vs.* Chas. A. Street *et. al.*, def'ts in error. Affidavit of W. H. Webster for pl'ffs in error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 226.

WALLACE P. COOK AND WILLARD P. COOK, PLAINTIFFS IN ERROR,

vs.

CHARLES A. STREET, W. B. CHATFIELD AND F. A. KEEP.

BRIEF FOR DEFENDANTS IN ERROR.

F. C. WINKLER,
of Counsel.

KING-FOALE-M'GEE CO., PRINTERS, MILWAUKEE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 226.

WALLACE P. COOK AND WILLARD P. COOK, PLAINTIFFS IN ERROR,

vs.

CHARLES A. STREET, W. B. CHATFIELD AND F. A. KEEP, DEFENDANTS IN ERROR.

I.

The only exceptions presented for review in this case are upon three questions proposed to the witness George R. Arnold, and one to the witness G. W. Hanley, to each of which an objection was sustained (pp. 20 and 21, printed Record).

No exceptions were taken to the Judge's charge.

The trial was commenced November 5, 1890. The case was given to the jury November 7 (Record, p. 12). *No exceptions to the charge were taken at the trial.*

The verdict was rendered November 8, and judgment is entered as of that date (pp. 13, 14). The bill of exceptions seems to have been dated back to the same day, but it was settled and signed much later.

The bill of exceptions shows that no exceptions were taken to the charge at the trial, but that long afterwards the attorneys of plaintiff in error "filed with the clerk" written exceptions *dated December 22, 1890* (p. 26). Upon these exceptions it is sought to allege error in the charge.

Exceptions filed to a charge after the conclusion of a trial are clearly unavailable.

"By the uniform course of decision, no exceptions to rulings at the trial can be considered by this Court unless they were taken at the trial." *Per* Mr. JUSTICE GRAY in Mich. Ins. Bank v. Eldred, 143 U. S., 298. Approved and re-affirmed in Thiede v. Utah Territory, 159 U. S., 510, 522.

"The rule in relation to exceptions to instructions is that the mat-

ter excepted to shall be so brought to the attention of the Court before the retirement of the jury, as to enable the Judge to correct error, if there be any." Mr. CHIEF JUSTICE FULLER, in Hickory v. U. S., 151 U. S., 303, 316.

"The practice and rules of the State Court do not apply to proceedings taken in a Circuit Court of the United States for purpose of reviewing in this Court a judgment of such Circuit Court."

Chateaugay Iron Co., petitioner, 128 U. S., 544.
M. P. R. Co. v. C. & A. R. Co., 132 U. S., 191.
Fishburn v. C. M. & St. P. R. Co., 137 U. S., 60.

Further authorities to the same effect might be cited, but these rules are very familiar in this Court.

II.

The plaintiffs below had bought of the defendants a quantity of logs in the woods, paying therefor $53,367.47. They were to be delivered *by the defendants* at the Menomonee River Manufacturing Company's boom.

All the logs *so delivered* were to be scaled by the Doyle rule in the mill where sawed. The number of feet shown by this scale was made the basis of final adjustment of the contract. The number by which they should fall short of 4,851,580 was to be charged back to the defendants, and by them paid for to the plaintiffs at $11 per thousand.

The contract provided that Albert B. Lawton was to be the scaler at the mill "so long as he scaled fairly." The contract pointed out explicitly how he might be superseded (Record, p. 5). He never was superseded. One of the defendants did indeed write a letter to the plaintiffs, dated September 9, 1887, in which he stated that he deemed the scale now being made by Lawton under the contract "unfair and improper," and demanded the selection of a new man. To this the plaintiffs replied, asserting their belief in the fairness of Lawton, and refusing to make a change. Here the matter ended. No attempt was ever made to have the question of Lawton's proper scaling determined by arbitrators, as in the contract provided.

At the trial the defendants nevertheless attempted, and to a certain extent at least were permitted to attack the integrity of Lawton's scale. It is a conceded fact that upon the basis of Lawton's scale, given in evidence, the plaintiffs were entitled to a recovery of $13,664.

The first question arises upon questions put to George R. Arnold, the superintendent of the Marinette Sawmill Company (p. 20). The testimony sought to be obtained from Mr. Arnold *did not relate to the logs here in suit.*

He testified that in 1888 and 1889 his mill sawed lumber for the plaintiffs.

He was asked who scaled the logs and what the difference was between the lumber product and the log scale, and the questions were excluded.

They bore upon no issue in this case. It is true, as counsel for

plaintiffs in error says, that he had put into the answer of the defendants the allegation that Lawton was "the corrupt and pliant tool of the plaintiffs, always ready, in consideration of employment obtained for him by the plaintiffs in the character of scaler, to observe their wishes and follow their suggestions in any course by which the interests of the plaintiffs would be aggrandized."

But it is also true that there was no attempt at proof, or any pretense or proposal of evidence, that the plaintiffs, either in this case or any other, had ever in any manner sought or attempted to obtain an unfair scale, or had been in any way advised that Lawton was making an unfair scale, except forsooth in the equivocal letter of "W. P. Cook," already referred to, which was never followed up by an investigation, such as the contract provides for.

The questions propounded to Mr. Arnold were accompanied by no offer or statement of what was proposed to be proven. It does not in any way appear that if the objections had been overruled the witness would have given testimony in any way injurious to Mr. Lawton's scaling, or bearing in any way on even the defendant's theory of this case.

The exclusion of testimony is not material error unless it is made to appear that the testimony excluded would have been material. The bill of exceptions, to be of any avail in such case, must show "what the answers would have been, or what the defendant offered to prove." It "must contain enough to enable the Court to see that the party was actually injured."

Smethurst v. Barton Square Church, 148 Mass., 261, 267.
Warren v. Spencer Water Co., 143 Mass., 155, 164.
Mitchell v. Harcourt, 62 Iowa, 349.
Jones v. Mining Company, 58 Iowa, 549.
Lahn v. Gustafson, 73 Iowa, 633.
Plano Mf'g Co. v. Frawley, 68 Wis., 577.
R. R. Co. v. Madison, 123 U. S., 524.
Spaids v. Cooley, 113 U. S., 278.

Stowell v. Mich. Salt Ass'n Co. 66 N. W. R. 362 (Wis.

Any testimony which Mr. Arnold could give would clearly not relate to the number of logs delivered by the defendants nor to their contents.

The authorities cited by counsel for plaintiffs in error on page 15 of his brief, do not reach the case at bar.

No fraudulent act on the part of Lawton has been proven in this case. One of the parties in interest and an employee of his have given some evidence in criticism of Lawton's scaling, but not a word that tends to prove fraud. If Mr. Arnold should give similar evidence in regard to his scaling other logs, it would neither tend to prove fraud nor fraudulent intent.

If it was intended to prove fraudulent conduct at Mr. Arnold's mill, the questions put are clearly insufficient to constitute such an offer, even if it were material.

Furthermore, the controversy as to Lawton's proper scaling in this case arose in September, 1887. Mr. Arnold was questioned in regard to scaling done in 1888 and 1889.

III.

We shall not review the learned Judge's charge to the jury. There are no exceptions. The only thing in the charge which may be subject to criticism (and which counsel assails with wild vehemence) are a few words in the following sentence: "As I have stated to you before, neither party could get rid of Lawton without showing *to the satisfaction of the other* that he was not scaling according to the terms of the contract." These words "to the satisfaction of the other," if they stood alone and were not qualified by "as I have stated to you before," would not be correct as an abstract proposition. But it is immaterial. The question of the removal of the scaler was not before the Court. It is clear beyond room for dispute that upon the mere letter of September 9, 1887 (and it is the only step ever taken by them) the defendants were not entitled to the removal of Mr. Lawton. It contained no facts or reasons, but simply stated that the writer, one of the defendants, "deemed the scale now being made unfair and improper." To this the other side certainly had the right to reply, as they did, that they deemed the scaling fair and challenge proof under the contract. Upon this it was the clear duty of the Cooks, if they desired to persist, to ask for the appointment of the board of arbitrators and bring their proofs before them. The contract says: "In case any disagreement shall arise as to the fairness of any scaler's scale, and the parties hereto are unable to settle the same, then three disinterested persons shall be chosen at once and without delay, one by each party hereto, the two to choose a third, who shall decide as to such fair scaling."

Counsel argues the case as if the letter of September 9, 1887, had been a proposal to subject Lawton's scaling to the judgment of arbitrators and the plaintiffs' reply a refusal. But it is plain that the letters will bear no such construction. W. P. Cook's letter asked no such thing, but *required* that Street, Chatfield & Co. *join him in the selection of a new man.*

When the latter had stated their non-concurrence in Mr. Cook's *ipse dixit* that Lawton's scaling was unfair, it was certainly for him to take steps, if he so wished, for the appointment of the tribunal before which to present proofs.

This in his prudence he forebore.

IV.

A further exception is to a question put to G. W. Hanley (p. 21).

Hanley testifies that he became secretary of the Menomonee River Boom Company the 1st of January, 1890, and had no previous connection with it.

Then he is asked to state what quantity of logs bearing the marks which plaintiffs had bought of defendants were scaled through the booms of the Menomonee River Boom Company during the season of 1888, and to the close of the sawing season of 1889. There is no pretense that he had any personal knowledge on the subject.

The question of the admissibility of entries made from day to day in the regular course of a business, with proper evidence to support them, was not presented. No record was offered or shown.

Nor was there any evidence of how or by whom any record was kept or made.

In Gardner v. Wilber, 75 Wis., 601, cited by plaintiff in error, daily records kept by the mill-owner where the lumber was sawn were admitted against the plaintiffs, "*their accuracy being indorsed by the plaintiffs by paying for sawing the amount of lumber which they indicated. There was also considerable other proof of their accuracy.*" "Under these circumstances," the Court say, "we think such entries were competent testimony."

This certainly is no authority for the question put to Mr. Hanley.

Peterson v. Anderson, 44 Michigan, 441, is no nearer in point. In that case the contention was that the parties to the suit had adopted the boom scale in their dealings, and the testimony of the secretary was held competent to show what this scale, so claimed to have been accepted, was.

To the same effect is Smith v. Kelly, 43 Mich., 390. The question there was as to the scale of a particular company as to which the parties had contracted. The scale was held admissible because, by their contract, the parties had made it of the *res gestæ*.

V.

The exceptions *claimed* by plaintiffs in error, both to exclusion of evidence and to portions of the charge, have all become utterly immaterial in view of the verdict rendered.

The plaintiffs' claim, based on Mr. Lawton's scale, was $13,664. The points of exception only go to combat the conclusiveness of Lawton's scale. The verdict rendered was only $5,934.88.

It was undoubtedly a very wrong verdict, a great wrong to the plaintiffs. But the defendants (plaintiffs in error) cannot complain of it.

It is clearly not based on Lawton's scale. Right or wrong, the defendants succeeded to get away from that scale. Counsel, at the top of page 28 of his brief, says that the jury discarded this scale (of which indeed there can be no doubt) and takes much satisfaction in saying that "*they found it fraudulent.*"

Yet all his exceptions and all his fiery argument go to the rulings of the Court in reference to that scale. Assuming, as we suppose we must, that the jury heeded the instructions of the Court, the inference is, as he says, inevitable that "*they found it fraudulent,*" and the verdict is found on that hypothesis.

In anticipation of the possibility of such a verdict, the learned Circuit Judge told the jury in his charge: "If you are satisfied that Lawton's scaling was fraudulent, *you will disregard his scaling reports and reach a conclusion as best you can upon all the evidence before you*" (p. 24).

This is manifestly what the jury has done. To this direction there was no attempt at exception. Indeed, it was all in favor of the defendants.

The concluding words to the jury doubtless contributed largely to the result. They were:

"You may not be able to reach an absolutely correct result; you

cannot determine the exact amount due from one party to the other; it is a good deal like scaling; it is only a presumption. Exercise your best judgment as to the amount due from one to the other, and try to settle the controversy between them."

Of this the *plaintiffs* certainly had very good reason to complain. It wholly lost sight of the terms of the contract between the parties and wholly ignored the binding force of Lawton's scale. It left it to the jury, so to speak, to re-scale the logs.

There is no attempt at exception to this on the part of the plaintiff in error.

It is evident, however, that the jury have made use of the liberty thus granted them to adjust the account between the parties as they thought right upon all the evidence in the case.

The matters, therefore, to which exceptions are alleged and which all go to the binding effect of Lawton's scale, under the terms of the contract, become wholly immaterial.

That the verdict, in this view, is very amply supported, cannot be questioned here. There was much evidence given in rebuttal, tending to sustain Mr. Lawton's scale. Among other things, the *actual lumber product* of the logs delivered was given in evidence (p. 22).

Upon the whole evidence in the case, disregarding Mr. Lawton as an umpire under the contract, the jury, under instructions not complained of, fixed the amount due.

The defendants at least have no reason to grumble at the verdict.

The judgment, it is submitted, should be affirmed.

F. C. WINKLER,
Counsel for Defendants in Error.

163 U.S. 682

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1895.

No. 955.

EUGENIA CRIMP, EXECUTRIX, &C.,
Appellant,

vs.

McCORMICK CONSTRUCTION COMPANY ET AL.,
Appellees.

From the United States Circuit Court of Appeals for the Seventh Circuit.

Transcript of Record.

JNO. N. JEWETT,
Of Counsel for Appellant.

BARNARD & MILLER, PRINTERS, CHICAGO.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1895.

No. 251.

EUGENIA CRIMP, EXECUTRIX, ETC.,
Appellant,

vs.

McCORMICK CONSTRUCTION COMPANY ET AL.,
Appellees.

MR. JOHN N. JEWETT,
MR. R. N. BAYLIES,
Counsel for Appellant Eugenia Crimp.

MR. WM. J. ENGLISH,
Counsel for Appellant Ingersoll-Sergeant Drill Co.

MR. W. E. CHURCH,
MR. FRANK S. WEIGLEY,
MR. CHARLES M. STURGES,
MR. LOREN C. COLLINS,
MR. ADAMS A. GOODRICH,
MR. CLARENCE S. DARROW,
MR. WM. A. VINCENT,
MR. JOHN H. HAMLINE,
MR. FRANK H. SCOTT,
MR. FRANK E. LORD,
Counsel for Appellees.

Appeal from the Circuit Court of the United States, for the Northern District of Illinois, Northern Division.

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IN THE

CIRCUIT COURT OF THE UNITED STATES

NORTHERN DISTRICT OF ILLINOIS.

NORTHERN DIVISION.

99
07

EUGENIA CRIMP, EXECUTRIX,

vs.

McCORMICK CONSTRUCTION COMPANY AND R. P. McCORMICK.

Gen. No. 23,174.
Term No. 664.

1 Pleas in the Circuit Court of the United States for the Northern Division of the Northern District of Illinois, in Chancery sitting at the United States Court room, in the City of Chicago in said division and district, before the Hon. Romanzo Bunn, District Judge of the United States for the Western District of Wisconsin, on Wednesday, the fifteenth day of May, in the adjourned May term of said court, in the year of our Lord one thousand eight hundred and ninety-five, and of our Independence the one hundred and nineteenth year.

S. W. BURNHAM,
Clerk.

Eugenia Crimp,	*Executrix*,	*In Chancery.*
23,174 *vs.*		
McCormick Construction Company *et al.*		

Be it remembered that on this day, to wit: The fourth day of December, 1893, came the complainant in said entitled cause, by her solicitor, and filed in the clerk's office of said court her bill of complaint, which said bill of complaint is in words and figures following, to wit:

BILL OF COMPLAINT.

UNITED STATES OF AMERICA, }
NORTHERN DISTRICT OF ILLINOIS. } ss.

To the Judges of the Circuit Court of the United States for the Northern District of Illinois:

Bill of Complaint, filed Dec. 4, 1893.

2 Eugenia Crimp of Chicago, and a citizen of the State of Illinois, brings this, her bill against the McCormick Construction Company of St. Louis, and a citizen of the State of Missouri, and R. P. McCormick, a citizen of the State of Missouri.

(1.) And thereupon your orator complains and says: That, according to the best knowledge and belief of complainant, one R. P. McCormick, prior to the 12th day of July, 1892, organized in the State of Missouri, and under its laws, a corporation named and called the McCormick Construction Company, having its principal office in the City of St. Louis, in said Missouri, its object being among other things, the doing of engineering works and drainage works, of the kind hereinafter mentioned, its stock consisting of 250 shares, of $200 each (all of its capital stock being $50,000), of which stock said R. P. McCormick claimed to own 225 shares, and that some citizen of New York, whose name is unknown to complainant, and who never took any part in the transactions of said corporation owned the other 25 shares, but subject to a pledge to said McCormick for nearly all their face value.

3 That the directors of said corporation were said R. P. McCormick, W. P. Waugh and Rieger, all citizens of the United States, said McCormick was president and general manager, and said Waugh secretary, and said Rieger remained in Kansas City and took no part in the transactions of said corporation in the State of Illinois.

That said R. P. McCormick at all times actually directed and managed all the affairs and business of said corporation, and said Waugh never did anything about said corporation except what he was told to do by said McCormick and was merely employed and

paid by said McCormick to do such acts as he was so directed, under the title of director and secretary of said corporation. Bill of Complaint, filed Dec. 4, 1893.

(2) Complainant further states that on said last date said corporation, at Chicago, Illinois, entered into a contract with the Sanitary District, the first party therein, to execute certain drainage work, in a part of the Drainage Channel, being made by said first party, known as "Section No. 14," which work consisted of excavation and removal of earth, rock and other material, the furnishing of tools, explosives, labor, etc., the building of works specified in said contract. Said work under said contract was to be completed by said corporation contractor by the 30th day of April, 1896, and a proportionate part of said work (specified in said contract) was to be done each month, and payments to said contractor were to be made by said first party on or before the tenth and
4 twenty fifth days of each month, to the amount of 87½% of the contract price of the approximate amount of work done during the previous half month, on terms specified in said contract.

Said contract provides, among other things, that if said contractor should fail to prosecute or complete the work in the time and manner as specified therein, then said first party may terminate said contract, and in such case a reserve of 12½% shall be retained by said first party as liquidated damages for failure, and that if the work shall be abandoned by said contractor, or the rate of progress is not such as to insure its completion within the time specified, or the engineer shall certify that said work is unnecessarily or unreasonably delayed, and for certain other specified causes, said first party may take charge of said work, and have same completed at said contractor's expense.

Said contract will be produced at the hearing of the cause, and is hereby referred to for more particular and definite statement of its contents, said contract required the excavation of about 6,000 lineal feet, one million yards of solid rock, about two hundred and ten thousand yards of glacial drift, and building some 19,946 yards of rock wall and the contract price would amount to in the neighborhood of $800,000, it being a very important undertaking, requiring skill and good and diligent management in order to prove successful.

Said McCormick Construction Company established an office
5 in Chicago and one in Will County, Illinois.

(3) Complainant further states that said R. P. McCormick, acting as aforesaid, under the name of said McCormick Construction Company, commenced the execution of said contract, but carried it on according to the best knowledge and belief of complainant, in a very negligent, unskillful and extravagant manner, so that at and before the 24th day of July, 1893, said corporation was very heavily in debt, and said McCormick expected to soon be obliged to abandon said contract unless he could find some one to furnish money towards the execution of same.

(4) Complainant further states and charges that under the circumstances above mentioned, said R. P. McCormick applied to William G. Crimp, the husband of complainant, shortly before said last date, to furnish money for the carrying on of said contract, and said McCormick falsely represented to said William G. Crimp, that the carrying out of said drainage contract was progressing in a satisfactory and successful manner, and said McCormick showed to him, said Crimp, a certain draft of a contract which said McCormick had caused to be drawn up, and induced said William G. Crimp to enter into said contract, a copy of which contract is annexed hereto and made part of this bill, as Exhibit "A," and the original will be produced at the hearing.

6 Said contract was between said McCormick Construction Company and R. P. McCormick individually, as the party of the first part, and said William G. Crimp, as the party of the second part, dated July 24, 1893, and it was by it among other things stipulated and agreed as follows: That said R. P. McCormick was the owner of 225 shares of the capital stock of said McCormick Construction Company. That in consideration of $25,200 cash paid to said company by said second party, there should be at once assigned and issued to said second party 126 shares of said capital stock owned by said McCormick, full paid and non-assessable.

That said second party should be entitled to fifty per cent. of the net profit accruing to and to be derived by said company on account of said drainage work, and that said first party guarantees to said second party that the amount of said profit to become due and payable to said second party should not be less than $25,000 (not including the aforesaid sum of $25,200), and that said sum of $25,200 invested in stock should be returned to said second party before any division and distribution of said profits should be made, and on receipt both of said profits and said $25,200 said second

party should return to said McCormick all the shares of stock received by said second party. Bill of Complaint, filed Dec 4, 1893.

That as security for said guaranty of profits there should be delivered and assigned to said second party the remaining 99
7 shares of said McCormick's stock to be held as collateral for said undertaking, and also the before mentioned original drainage contract with the Sanitary District, should be held by said second party as security. Said contract with said Crimp stating expressly that it was intended that said Crimp, through his ownership and control of said 225 shares of stock, should control said drainage contract in the event of failure by said first party to carry out their contract with said Crimp, or in the event of any breach of said contract by said first party. It was expressly stipulated and agreed that said sum of $25,200 advanced by said second party should be used by said first party in the payment and liquidation of the certain specified debts and liabilities of said company, set out in a sworn schedule assets and liabilities attached to said contract and made part thereof, except as to one of the items of said indebtedness in said schedule of $7,000 to the Northwestern National Bank.

That in case of failure of said first party to carry out and faithfully perform all the agreements and undertakings in said contract, the said 99 shares of stock should immediately, upon such failure, become the property of said second party.

There was annexed to, and made a part of said contract with said Crimp, a written statement of assets and liabilities of said company, pretending to show assets amounting to $70,028, and that total liabilities amount to $27,956, and an affidavit by said R.
8 P. McCormick that said written statement of assets and liabilities of said company includes all the assets and liabilities of said company up to and including the date of July 20, 1893, as the same appear on the books of said company, and that said list includes all of the liabilities of said company at the date aforesaid, which affidavit was signed and sworn to by said McCormick on July 24, 1893, before a notary public of said Cook county. True copies of said schedules of assets and liabilities and affidavit being a part of said contract, are annexed hereto with said contract as exhibit "A" and the originals will be produced at the hearing.

(5) Complainant further states and charges that said William G. Crimp, wholly relying on the aforesaid statements of said R. P.

Bill of Complaint, filed Dec. 4, 1893.

McCormick as to the condition of said drainage work and said corporation, especially said sworn statement of the assets and liabilities of said corporation and said promise to pay them, was induced by said McCormick to execute, and did execute, said contract, and was induced by said McCormick to pay over to him in trust to be applied to the uses and purposed expressed in said contract the sum of $23,000 in cash, and thereafter to pay a further sum of $5,200 in cash, which was, as complainant is informed and belives, given to one Frost, who held some claim which said McCormick stated must be paid at once to prevent suit. That said contract was
9 executed by said corporation, and said McCormick caused a resolution confirming said contract to be passed by said Board of Directors as appears by a copy certified by them.

That at the time said Crimp was drawn into said scheme he was ill, and soon after the execution of said contract said William G. Crimp became much worse, whereby he was never able to, and never did, visit said drainage work more than a few times, and was confined to his house, and was never able to and never did become acquainted with the true condition of said corporation and the doings of said McCormick before and after said contract with him.

And said illness of said William G. Crimp continued to increase, and he was confined to his bed, and on the 14th day of November, 1893, he died, leaving a last will and testament in and by which all his property was devised to complainant and complainant named as the sole executrix of same.

And said will was duly approved in the probate court of said Cook County, and complainant was duly appointed and qualified as executrix of his said last will.

(6) Complainant further states that owing to illness of said Crimp, he was compelled to, and did trust entirely to said McCormick and said company to dispose faithfully of the large sum of money confided to their hands by him, in extinguishing said debts and carrying on said drainage work effectively. And said Crimp, and since his death complainant, has at all times done, and been ready and willing to do all things required by equity to be done
10 by him or her, and complainant is still ready and willing to do equity in the premises.

Complainant further states and charges that said R. P. Mc-

Bill of Complaint, filed Dec. 4, 1893.

Cormick, continuing and intending to defraud said William G. Crimp, never did apply said $23,000, which he received as aforesaid from him, to the payment of the debts or liabilities of said corporation, set out in said sworn schedule, except that he paid the sum of $4,000 upon said debt to the Northwestern National Bank, which kept the deposits of said corporation, and a few small amounts besides, as complainant is informed.

And, according to the best knowledge and belief of the complainant, the averment which said R. P. McCormick made and swore to, that said written statement of liabilities included all of the liabilities of said company at the date July 20, 1893, was wholly untrue in fact, and there were other large liabilities of said company at said date, as said McCormick at all times well knew. And said written statement of assets grossly and wilfully overstated the value of said assets, and said false statements were made solely with the intent to get hold of said money of said Crimp, under said trust, and then betray said trust and defraud said William G. Crimp out out of said large sum of money, which he, said McCormick, never intended to apply according to said agreement, but to convert the same, or the greater part of same, to his own use, and prevent
11 the carrying out of said drainage contract, and thereby prevent said Crimp from ever getting anything out of his said investment. And complainant states and charges that said R. P. McCormick took advantage of said trust and confidence which said William G. Crimp reposed in him and of his said illness, to commit and cause said company to commit a total breach of trust and utterly wreck and ruin the business of carrying out said contract with said sanitary district.

That a few days after said Crimp signed said contract, said McCormick handed him a paper having the seal of said company affixed, and certified by him and said Waugh, to be a correct copy of a resolution making said W. G. Crimp a director and vice-president of said Company and providing that all checks should be signed by the president and countersigned by the vice-president of said company.

Said contract provides that Crimp might furnish a suitable representative in the office of said company as assistant in its management, and owing to said Crimp's illness and inability to attend said work, one John Reilly was duly appointed as assistant in said management, and it was arranged with the Northwestern National Bank of Chicago, where said company made its deposits about a

Bill of Complaint, filed Dec. 4, 1893.

month before said Crimp's death, that all checks of said company should be countersigned by said Reilly, as well as signed by said president.

12 But said McCormick, according to complainant's best knowledge and belief, in pursuance of his said scheme, converted about $11,600 of the $23,000, paid in by said Crimp, for the uses aforesaid to his, said McCormick's, own use, before said arrangement was made for said Reilly to countersign checks. Complainant states that McCormick, some few days before said Crimp's death, not seeing how he could get hold of the remaining $7,400 which was in said bank, began to come to the house of said Crimp, and demand the sum of $4,000 in cash, and said McCormick states to complainant that he must have said sum or the whole business would be stopped and ruined, and he came two or three times a day to complainant's house (although complainant told him that said William G. Crimp was lying at the point of death and that she had no large sum of money) and demanded said money, and sent threatening letters to complainant.

Copies of letters of said McCormick are hereto annexed marked Exhibit B, and the originals will be produced at the hearing.

And complainant is informed and believes, and has good reason to believe that said McCormick, on the 11th day of November, 1893, in order to get out said $7,400 from said bank, drew a check for $74 and got said Reilly to countersign it, and then fraudulently altered said check to read $7,400, and took it to said bank and got said $7,400 in cash on said check, and has concealed said sum of $7,400 where it cannot be found, and converted it to his own use.

13 Complainant states, according to her best information and belief, that said McCormick came into the office of chief of detectives of Chicago police, at the City Hall in Chicago, on or about the morning of November 15, 1893, and falsely and fraudulently pretended to Captain Shea of said detectives that he had been robbed of over $7,000 the night before and then and there, upon being questioned, said McCormick admitted his story about being robbed was a falsehood concocted by himself. Since the making of said contract with said Crimp said McCormick has collected large sums of money of said Sanitary District, amounting to many thousands of dollars, but has never paid the indebtedness mentioned on his said sworn statement, and agreed to be paid by him out of

Bill of Complaint, filed Dec. 4, 1893.

said money Crimp handed to him. On the contrary, said McCormick has, on or about November 15th last, abandoned and caused his said corporation to abandon the work under said drainage contract, and nothing has been done on it since, and notice has been given to it by said Sanitary District, on or about November 17th, 1893, that there has been a substantial failure on its part to comply with said drainage contract, as to the progress of the work and said notice was served for the purpose of laying the foundation for the forfeiture of said contract, and said Sanitary Commission proposes and intends to forfeit the said contract, on or about December 16th next unless work is resumed at once and carried on according to its terms.

14 Said McCormick has been often requested by complainant to account for said money, and go on with the said drainage work, and call a meeting of the directors of said company and give complainant control of said corporation and said work, in order that she may try and make something to apply on said $28,200 which said McCormick got from said William G. Crimp, as hereinbefore stated or that said money be paid back and contract rescinded. Divers friends of said Crimp and complainant are financially and otherwise able to complete said contract for her benefit if she can have control, and have promised to do so, and they and complainant have so notified said McCormick.

But said McCormick has refused and still refuses to do any of said things requested of him, or to do anything to help complainant or any one interested. On the contrary, complainant greatly fears and believes that said McCormick acting with said Waugh, who is wholly under McCormick's control, and pretending to represent said McCormick Construction Company, as the only director thereof, will still further injure and destroy any interest or assets of said company and pass pretended resolutions and take other steps to further complicate and injure its affairs. Complainant states that said McCormick not satisfied with having obtained said William G. Crimp's money, in the manner aforesaid, and having injured and insulted his family while he was on his death bed, and having
15 left his family in such condition, now demands of complainant the sum of $25,000, as a consideration for calling a meeting of directors of said company, and turning over said business in its desperate state, to complainant or for her benefit.

Complainant states that there is no means by which any of said money got from her husband can be recovered except by at

Bill of Complaint, filed Dec. 4, 1893.

once proceeding to carry out said drainage contract, which complainant is advised and believes is a valuable asset if promptly and efficiently carried out, and a forfeiture prevented. That said McCormick, as complainant, is informed and believes, is wholly insolvent and without character or means, and said company has not and never had any property or assets equal to its liabilities, except said drainage contract and said contract is a worthless asset unless at once proceeded with.

That the materials, tools and property of all kinds which have been used in said drainage contract work are likely to be injured or destroyed or removed unless a receiver is appointed to take charge of same at once, and without notice to said corporation or to said McCormick and an injunction issued against interference with same.

That said corporation, called the McCormick Construction Company, as worked by said R. P. McCormick, is and always has been, before and since said drainage contract, a mere sham concern, used by said McCormick and said Waugh, who pretend to be a
16 majority or all of its directors, solely for the purpose of helping said R. P. McCormick defraud persons in this county and Will county, and if said corporation or McCormick or Waugh, or any one in their interest is notified of an application for an injunction or a receiver, complainant greatly fears and believes that they, or some of them, will by individual acts and pretended corporation acts, destroy or make away with books, papers, property and anything which is accessible to them which might aid complainant in going on with said drainage contract or getting justice and complainant will suffer irreparable injury and her rights will be unduly prejudiced unless said injunction is issued and a receiver appointed immediately and without notice to said persons. Complainant states that some of the creditors named in said written statement, constituting the greater amount and who were to have been paid as aforestated by said McCormick, have by the procurement of said McCormick, got possession of a large amount of tools, machinery, mules and other property of said corporation used for and necessary to the carrying out of said drainage contract, and complainant is informed and believes said creditors will be willing to surrender all of said property to a receiver, and that the true amount of all debts of said corporation can be obtained by such receiver if immediately appointed, and said work can be carried on so as to prevent a forfeiture of said drainage contract, until the whole of said
17 affairs can be adjusted and said receiver discharged.

Bill of Complaint, filed Dec. 4, 1883.

Complainant states that she has offered to said McCormick and said company to return all certificates of stock and contract in her possession, and to do all that equity may require, if said money is paid back and contract rescinded, but he has refused to pay or do anything. Complainant is advised and believes that she is entitled to have said contract with said McCormick Construction Company set aside and annulled, for fraud in obtaining it, or in case the court should find that the evidence is not sufficient to warrant such relief, then she is entitled to have said contract specifically performed, and to have a remedy for the gross breaches of trust committed with reference to said contract, and said funds entrusted to said McCormick and said corporation. The premises considered complainant prays that said McCormick Construction Company and said R. P. McCormick may be made parties defendant to this bill and duly summoned and required to answer said bill, but not upon oath, the oath being hereby expressly waived and that they answer as fully and particularly to the matters aforesaid, as if specifically interrogated, and that defendants may s t forth a description of all books, accounts or writings relating to said corporation. That said defendants may be enjoined from taking, or in any way interfering with any personal property, books, papers, instruments of writing, and all kinds of property whatever of said corporation, or connected with said drainage work. That a suitable person to receive and collect the property and assets of said corporation, and to carry on the business of completing said drainage contract may be appointed with proper powers and directions and said McCormick may be compelled to account for and pay over all moneys received by him from said Crimp, and that an account may be taken of the assets and liabilities of said corporation, and of all its transactions since obtaining said money from said Crimp.

18

And that in case the court should find that said contract was obtained by fraud, it may be set aside and a decree made for return of said money and other relief granted, as equity may require, or that the provisions of said contract as to the amount of profits to be given to said Crimp, and the application of the moneys paid over by him be enforced, and said company and McCormick compelled to account for all of said moneys so misappropriated, or cause all the debts mentioned in said written statement to be paid and extinguished as required by said contract, and that full control be given to complainant as provided in said contract, and that complainant may have such other and further relief as equity may require.

Bill of Complaint, filed Dec. 4, 1893.

May it please your Honor to grant to complainant a writ of subpœna to be directed to said McCormick Construction Company and said R. P. McCormick thereby commanding them and each of them at a certain time to appear and answer, etc. And to grant unto complainant a writ of injunction to be directed to said defendants, to restrain them from taking or interfering in any way with any personal property, books, papers, choses in action, instruments of writing, and all kinds of property whatever of said corporation or connected with said drainage work. And to appoint a receiver, as prayed for herein, and for general relief, etc.

EUGENIA CRIMP,
Complainant.

A. S. BRADLEY,
Solicitor and Counsel for Complainant.

UNITED STATES OF AMERICA, }
NORTHERN DISTRICT OF ILLINOIS. } ss.

Eugenia Crimp, being duly sworn, makes oath that she has read the above bill subscribed by her, and knows the contents thereof, and that the same is true of her own knowledge, except as to matters which are therein stated to be on her information and belief and as to those matters she believes them to be true.

EUGENIA CRIMP.

Subscribed and sworn to before me this 4 day of December, A. D. 1893.

G. W. JOHNSON,
Notary Public.

[SEAL.]

For Exhibit "A" see report of master in chancery, Wm. M. Booth, page 220).

[Endorsed]: Filed Dec. 4, 1893.

S. W. BURNHAM,
Clerk.

On the same day, to wit: the fourth day of December, in the
25 adjourned October term of said court, 1893, in the record of proceedings thereof in said entitled cause, before the Hon. Peter S. Grosscup, District Judge, appears the following entry, to wit:

Eugenia Crimp,
23174. *vs.* } *In Chancery.*
McCormick Construction Company and R. P. McCormick.

This cause coming on to be heard on the motio
ant for an injunction, and the appointment of a rec
fendant, the McCormick Construction Company, u
complaint, verification thereof, affidavit of John J.
hibits to said bill *ex parte*, and it appearing to the c
ceiver should be appointed and a restraining order
notice.

Answer.

It is ordered that a restraining order issue in accordance with the prayer of said bill, to remain in force until the motion of injunction can be heard, which is assigned for December 13th at 10 A. M., and that Patrick J. Sexton be appointed receiver of the defendant, The McCormick Construction Company, upon entering into bond with good surety to be approved by the court, in the sum of thirty thousand dollars, and that said Sexton, as such receiver, may take possession of the property, books and choses in action of said company and works and contract for drainage work mentioned in the bill, and is invested with all the powers and authority and charged with all the duties of such receiver as prayed for in said
bill, and that said receiver may, under the direction of this
26 court, continue the management of said drainage contract of said company until further order of this court.

Afterwards, to-wit: on the ninth day of December, 1893, came the defendants in said entitled cause, by their solicitors, and file in the clerk's office of said court their answer to the bill of complaint, which said answer is in the words and figures following, to wit:

Bill of Complaint, filed Dec. 4, 1893.

May it please your Honor to grant to complainant a writ of subpœna to be directed to said McCormick Construction Company and said R. P. McCormick thereby commanding them and each of them at a certain time to appear and answer, etc. And to grant unto complainant a writ of injunction to be directed to said defendants, to restrain them from taking or interfering in any way with any personal property, books, papers, choses in action, instruments of writing, and all kinds of property whatever of said corporation or connected with said drainage work. And to appoint a receiver, as prayed for herein, and for general relief, etc.

EUGENIA CRIMP,
Complainant.

A. S. BRADLEY,
Solicitor and Counsel for Complainant.

UNITED STATES OF AMERICA, }
NORTHERN DISTRICT OF ILLINOIS. } ss.

Eugenia Crimp, being duly sworn, makes oath that she has read the above bill subscribed by her, and knows the contents thereof, and that the same is true of her own knowledge, except as to matters which are therein stated to be on her information and belief and as to those matters she believes them to be true.

EUGENIA CRIMP.

Subscribed and sworn to before me this 4 day of December, A. D. 1893.

G. W. JOHNSON,
Notary Public.

[SEAL.]

For Exhibit "A" see report of master in chancery, Wm. M. Booth, page 220).

[Endorsed]: Filed Dec. 4, 1893.

S. W. BURNHAM,
Clerk.

On the same day, to wit: the fourth day of December, in the
25 adjourned October term of said court, 1893, in the record of proceedings thereof in said entitled cause, before the Hon. Peter S. Grosscup, District Judge, appears the following entry, to wit:

Eugenia Crimp,
23174. *vs.*
McCormick Construction Company and R. P. McCormick. } *In Chancery.*

Record Entry.

This cause coming on to be heard on the motion of complainant for an injunction, and the appointment of a receiver of the defendant, the McCormick Construction Company, upon the bill of complaint, verification thereof, affidavit of John J. Reilly and exhibits to said bill *ex parte*, and it appearing to the court that a receiver should be appointed and a restraining order issued without notice.

It is ordered that a restraining order issue in accordance with the prayer of said bill, to remain in force until the motion of injunction can be heard, which is assigned for December 13th at 10 A. M., and that Patrick J. Sexton be appointed receiver of the defendant, The McCormick Construction Company, upon entering into bond with good surety to be approved by the court, in the sum of thirty thousand dollars, and that said Sexton, as such receiver, may take possession of the property, books and choses in action of said company and works and contract for drainage work mentioned in the bill, and is invested with all the powers and authority and charged with all the duties of such receiver as prayed for in said bill, and that said receiver may, under the direction of this
26 court, continue the management of said drainage contract of said company until further order of this court.

Afterwards, to-wit: on the ninth day of December, 1893, came the defendants in said entitled cause, by their solicitors, and file in the clerk's office of said court their answer to the bill of complaint, which said answer is in the words and figures following, to wit:

Bill of C
plaint,
Dec. 4,

ANSWER.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS,
NORTHERN DIVISON. } ss.

IN EQUITY.

Eugenia Crimp, Executrix, etc.,
Complainant,
vs.
McCormick Construction Company and R. P. McCormick,
Defendants.
} *Term No. 667.*
General No. 23174.

Answer.

The answer of the McCormick Construction Company and R. P. McCormick, the above named defendants to the bill of complaint of the above named complainant.

These defendants, saving unto themselves all benefits of exception or otherwise which can be taken to said bill, admit that the McCormick Construction Company was organized in the State of Missouri and under its laws prior to the 12th day of July, 1892, 27 as a corporation, having its principal office in the city of St. Louis in said State of Missouri, and that its object is, among other things, the doing of engineering works and drainage works, that its stock consists of 250 shares of two hundred dollars ($200) each, and that the said defendant, R. P. McCormick, claimed to own and did own 225 shares of said stock; defendants deny that any citizen of New York owned the other 25 shares subject to a pledge to the said defendant, McCormick, for all or nearly all of their face value. Defendants deny that on the said 12th day of July, 1892, and prior thereto, the directors of said corporation were said R. P. McCormick, W. P. Waugh and.... Rieger, but admit that the said McCormick and the said Rieger were directors, and that said McCormick was president and general manager. Defendants deny that said Waugh was secretary upon said 12th day of July, 1893, and they deny that the said

Rieger took no part in the transaction of said corporation in the State of Illinois.

Defendants deny that the said McCormick at all times actually directed and managed all the affairs and business of said corporation and they deny that said Waugh never did anything about said corporation except what he was told to do by said McCormick, and they deny that the said Waugh was merely employed and paid by the said McCormick to do such acts as the said McCormick directed. Said defendants aver that the affairs and business of the said corporation have been conducted by its officers and board of directors in a lawful and proper manner and that the said Waugh since the time he was elected a director and secretary of the
28 said company has performed his duty therein in a careful and business like manner and for the best interests of the said corporation and that the said McCormick has at all times acted as president of the said corporation and performed the usual duties pertaining to such office.

Further answering the defendants admit that on the said 12th day of July, 1892, said corporation at Chicago, Illinois, entered into a contract with the Sanitary District the first party therein to execute drainage work in part of the drainage channel being made by said first party known as "section number 14," which work consists of excavation and the removal of earth, rock and other material, the furnishing of tools, explosives, labor, etc., and the performance of work specified in said contract, that said work under said contract was to be completed by said corporation contractor by the 30th day of April, 1896, and a proportionate part of said work (specified in contract) was to be done each month, and payments on said contract were to be made by said first party on or before the 10th and 25th days of each month to the amount of 87½ % of the contract price of the approximate amount of work done during the previous half month on terms specified in said contract.

Further answering said defendants admit that said contract provides among other things that if the said contractor should fail to complete the work in the time and manner as specified therein then said first party may terminate said contract and in such case a reserve of 12½ % shall be retained by first party as liquidated damages for failure, and that if the work shall be abandoned by said contract or the rate of progress is not such as to in-
29 sure its completion in the time specified, or the engineer shall certify that said work is unnecessarily or unreasonably delayed

Answer. and for certain other specified causes said first party may take charge of said work and have same completed at said contractor's expense.

Further answering defendants admit that said contract required the excavation of about six hundred (600) lineal feet, one million (1,000,000) yards of solid rock, about two hundred and ten thousand (210,000) of glacial drift and building some nineteen thousand nine hundred and forty-six (19,946) feet of rock management in order to prove successful.

Further answering the said defendants admit that said McCormick Construction Company established an office in Chicago, Illinois, and one in Will county, Illinois, but defendants deny that said R. P. McCormick under the name of said McCormick Construction Company commenced the execution of said contract, but aver that said McCormick Construction Company under the presidency and management of said R. P. McCormick commenced the execution of said contract, and defendants deny that the execution of said contract was carried on in a very negligent, unskillful and extravagant manner; and defendants deny that at and before the 24th day of July, 1893, said corporation was very heavily in debt, except as stated and fully set forth in the contract hereinafter referred to between said McCormick Construction Company and R. P. McCormick of the first part and William G. Crimp of the second part. And defendants deny that said McCormick expected to soon be obliged to abandon said contract unless he could find some one to furnish money towards the execution of the same, but on the contrary said defendants aver and state the fact to be that the execution of said drainage contract was carried on in a careful, skillful and economical manner, all of which was well known by said William G. Crimp, before the execution of the said contract. And the said defendants aver that if the said work has not progressed and been performed in any manner satisfactory to the said Eugenie Crimp and the said William G. Crimp it is because, and the said defendants aver the fact to be, that the said William G. Crimp did not well and faithfully carry out and perform the agreements and undertakings entered into to be performed by him in said contract, and because one Patrick J. Sexton, acting for the said William G. Crimp and the said Eugenie Crimp as their agent and representative, conspired with divers persons to hinder and embarrasss the said defendants and to so harass and annoy them that the said defendant McCormick Construction Company could not carry out its contract with the said Sanitary District, and the de-

fendants aver and charge the fact to be that the said Patrick J. Sexton desired that there should be a forfeiture of the said contract with the said Sanitary District or that in some way he could obtain an assignment of said contract to him, the said Patrick J. Sexton, without great expense to him and so defraud the said de-
31 fendants out of the profits and emoluments which would arise to them from the completion of the said contract by said McCormick Construction Company.

Further answering the defendants deny that said R. P. McCormick applied to William G. Crimp, the husband of complainant, shortly before July 24, 1893, to furnish money for the carrying on of said contract, and they deny that said McCormick falsely represented to said William G. Crimp that the carrying out of said drainage work was progressing in a satisfactory and successful manner. And they deny that said McCormick showed to him the said Crimp a certain draft of contract, which said McCormick had caused to be drawn up, and they deny that said McCormick induced said Crimp to enter into said contract, but defendants aver and state the fact to be that early in July, 1893, said McCormick stated to a certain broker in the city of Chicago, Illinois, that said McCormick Construction Company was in need of funds to carry on said contract, and thereupon said broker offered to raise said funds for such purpose and introduced said McCormick to said Patrick J. Sexton, being the same Patrick J. Sexton who has been appointed a receiver in this case. And the said Sexton thereupon sent said McCormick to the said William G. Crimp, and stated that the said Crimp was a partner of him, the said Sexton and that whatever said Crimp might do would be satisfactory to the said Sexton and thereupon said McCormick and said broker began negotiations with the said Crimp with reference to furnishing a sum of money for the purpose aforesaid, said negotiations extended over a period of at least two weeks during which time said Crimp several times visited the camp of the said McCormick Construction Company and
32 inspected the condition of the work and made a careful personal examination of everything pertaining to the business of the said company and the work under the said contract with the said Sanitary District, and in general informed himself thoroughly in everything pertaining thereto, and thereupon agreed to enter into a contract with the said McCormack Construction Company and took said McCormick to the attorney of said Crimp and said Sexton. Thereupon said contract was drawn up in said attorney's office and under the direction of the attorney for the said Crimp and said Sexton and on the 24th day of July 1893, executed by the parties.

Answer. and for certain other specified causes said first party may take charge of said work and have same completed at said contractor's expense.

Further answering defendants admit that said contract required the excavation of about six hundred (600) lineal feet, one million (1,000,000) yards of solid rock, about two hundred and ten thousand (210,000) of glacial drift and building some nineteen thousand nine hundred and forty-six (19,946) feet of rock management in order to prove successful.

Further answering the said defendants admit that said McCormick Construction Company established an office in Chicago, Illinois, and one in Will county, Illinois, but defendants deny that said R. P. McCormick under the name of said McCormick Construction Company commenced the execution of said contract, but aver that said McCormick Construction Company under the presidency and management of said R. P. McCormick commenced the execution of said contract, and defendants deny that the execution of said contract was carried on in a very negligent, unskillful and extravagant manner; and defendants deny that at and before the 24th day of July, 1893, said corporation was very heavily in debt, except as stated and fully set forth in the contract hereinafter referred to between said McCormick Construction Company and R. P. McCormick of the first part and William G. Crimp of the second part. And defendants deny that said McCormick expected to soon be obliged to abandon said contract unless he could find some one to furnish money towards the execution of the same, but on the contrary said defendants aver and state the fact to be that the execution of said drainage contract was carried on in a careful, skillful and economical manner, all of which was well known by said William G. Crimp, before the execution of the said contract. And the said defendants aver that if the said work has not progressed and been performed in any manner satisfactory to the said Eugenie Crimp and the said William G. Crimp it is because, and the said defendants aver the fact to be, that the said William G. Crimp did not well and faithfully carry out and perform the agreements and undertakings entered into to be performed by him in said contract, and because one Patrick J. Sexton, acting for the said William G. Crimp and the said Eugenie Crimp as their agent and representative, conspired with divers persons to hinder and embarrasss the said defendants and to so harass and annoy them that the said defendant McCormick Construction Company could not carry out its contract with the said Sanitary District, and the de-

fendants aver and charge the fact to be that the said Patrick J. Sexton desired that there should be a forfeiture of the said contract with the said Sanitary District or that in some way he could obtain an assignment of said contract to him, the said Patrick J. Sexton, without great expense to him and so defraud the said de-
31 fendants out of the profits and emoluments which would arise to them from the completion of the said contract by said McCormick Construction Company.

Further answering the defendants deny that said R. P. McCormick applied to William G. Crimp, the husband of complainant, shortly before July 24, 1893, to furnish money for the carrying on of said contract, and they deny that said McCormick falsely represented to said William G. Crimp that the carrying out of said drainage work was progressing in a satisfactory and successful manner. And they deny that said McCormick showed to him the said Crimp a certain draft of contract, which said McCormick had caused to be drawn up, and they deny that said McCormick induced said Crimp to enter into said contract, but defendants aver and state the fact to be that early in July, 1893, said McCormick stated to a certain broker in the city of Chicago, Illinois, that said McCormick Construction Company was in need of funds to carry on said contract, and thereupon said broker offered to raise said funds for such purpose and introduced said McCormick to said Patrick J. Sexton, being the same Patrick J. Sexton who has been appointed a receiver in this case. And the said Sexton thereupon sent said McCormick to the said William G. Crimp, and stated that the said Crimp was a partner of him, the said Sexton and that whatever said Crimp might do would be satisfactory to the said Sexton and thereupon said McCormick and said broker began negotiations with the said Crimp with reference to furnishing a sum of money for the purpose aforesaid, said negotiations extended over a period of at least two weeks during which time said Crimp several times visited
the camp of the said McCormick Construction Company and
32 inspected the condition of the work and made a careful personal examination of everything pertaining to the business of the said company and the work under the said contract with the said Sanitary District, and in general informed himself thoroughly in everything pertaining thereto, and thereupon agreed to enter into a contract with the said McCormack Construction Company and took said McCormick to the attorney of said Crimp and said Sexton. Thereupon said contract was drawn up in said attorney's office and under the direction of the attorney for the said Crimp and said Sexton and on the 24th day of July 1893, executed by the parties.

Answer.

Further answering the defendants admit that the said contract was between said McCormick Construction Company and R. P. McCormick individually as party of the first part, and said William G. Crimp, as party of the second part dated July 24th, 1893, and that it was by it among other things stipulated and agreed as follows: That said R. P. McCormick is the owner of 225 shares of the capital stock of said McCormick Construction Company, that in consideration of twenty-five thousand two hundred dollars ($25,200.00) cash paid to said company by said second party, there should be at once assigned and issued to said second party 126 shares of said capital stock owned by said McCormick fully paid and non-assessable, that said second party should be entitled to fifty per cent. (50%) of the net profits accruing to and to be derived by said company on account of said drainage work and that said first party guarantees to said second party that the amount of said profit to become due and payable to the said second
33 party should be not less than twenty-five thousand dollars ($25,000), not including the aforesaid sum of twenty-five thousand two hundred dollars ($25,200.00), and that said sum of twenty-five thousand two hundred dollars ($25,200.00), invested in stock should be returned to said second party before any dividend and distribution of said profit should be made, and on receipt both of said profit and said twenty-five thousand two hundred dollars ($25,200.00) said second party should return to said McCormick all the shares of stock received by said second party; but said defendants deny that in and by said contract said McCormick Construction Company became in any way liable for payment of said sum of twenty-five thousand dollars ($25,000) as profit under said contract or of said sum of twenty-five thousand two hundred dollars ($25,200.00) invested in the stock of said company. Said defendants admit it was provided in said contract that, as security for said guarantee of profits, there should be delivered and assigned to said second party the remaining 99 shares of said McCormick stock to be held as collateral for the said undertaking, and also the before mentioned original drainage contract with the Sanitary District should he held by said second party as security as in said bill alleged. And the said defendants aver upon information and belief that the delivery of the said original contract with the said Sanitary District as fet forth in the contract with the said Crimp was suggested by the said Sexton for the sole purpose, as these defendants are informed and believe, of furthering the said
34 conspiracy of said Sexton and facilitating the acquisition by said Sexton of all rights under said first named original contract with said Sanitary District and in pursuance of the said con-

spiracy entered into by the said Sexton and others of defrauding said defendants out of the profits and emoluments arising from said contract with said Sanitary District. Answer.

Further answering, defendants admit that it is stipulated and agreed that said sum of twenty-five thousand two hundred dollars ($25,200.00) advanced by the said second party be used by said first party in the payment and liquidation of the certain specified debts or liabilities of said company set out in a schedule of assets and liabilities attached to said contract and made a part thereof except as to one of the items of said indebtedness in said schedule of seven thousand dollars ($7,000.00) to the Northwestern National bank, but the defendants aver that subsequent to the formation of said contract with the said Crimp it was agreed between the said Crimp and the said McCormick Construction Company that the indebtedness of eight thousand five hundred dollars ($8,500.00) to Parker, Melcher and Ingraham should not be paid out of said sum of twenty-five thousand two hundred dollars ($25,200), but that the said Crimp should endorse notes of the said McCormick Construction Company payable to Ingersoll-Sargeant Drill Company, for whom the said Parker, Melcher and Ingraham were acting as sales agents, and the said indebtedness in said statement specified as being an indebtedness to Parker, Melcher and Ingraham was in fact an indebtedness to said Ingersoll-Sergeant Drill Company.

Defendants further aver that under and by said contract the
35 said Crimp agreed to advance the sum of seven thousand dollars ($7,000.00) in addition to the aforeaid sum of twenty-five thousand two hundred dollars ($25,200.00) to pay the item of that amount set out in said schedule to become due to the Northwestern National Bank and the defendants charge that the said Crimp never executed the notes to the said Ingersoll-Sergeant Drill Company as agreed and never paid any part of the said indebtedness to the said Ingersoll-Sergeant Drill Company or Parker Melcher and Ingraham, and that said Crimp never advanced to said McCormick Construction Company the additional sum of seven thousand dollars ($7,000.00) to pay the item of that amount set out in the schedule to the Northwestern National Bank and which after the making of said agreement and on or about the 10th day of August, 1893, become due to said Northwestern National Bank, and the said defendants aver that said defendant, McCormick Construction Company, much to its embarrassment has been obliged to pay the sum of four thousand dollars ($4,000) to the said Northwestern

Answer. National Bank of said indebtedness and that in consequence of the violation of the said Crimp's agreement to pay said debt to the Northwestern National Bank and to endorse notes of the McCormick Construction Company to the said Ingersoll-Sergeant Drill Company, as agreed te be done by him, the said Crimp, McCormick Construction Company has been greatly embarrassed and annoyed, and in order to satisfy the demands of the said
36 Ingersoll-Sergeant Drill Company and the said Northwestern National Bank, has been obliged to execute to them a chattel mortgage covering all its personal property, and defendants further aver that in consequence of the failure of the said Crimp so to perform his agreement, the mortgagees in said chattel mortgage have taken possession of the property of said defendants and have advertised the same for sale on the 16th day of December, 1893.

Defendants further answering admit that it was provided in said contract, that in case of failure of said first party to carry out said and faithfully perform all the agreements and undertakings in said contract, the said 99 shares of stock should immediately upon such failure become the property of said second party and defendants aver that they have faithfully performed their part of said contract.

Further answering the defendants admit that there was annexed to and make a part of said contract with said Crimp a written statement of the assets and liabilities of said company showing assets amounting to seventy thousand and twenty-eight dollars ($70,028.00) and the total liabilities amounting to twenty-seven thousand nine hundred and fifty-six dollars ($27,956.00) and an affidavit by said R. P. McCormick that said written statements of assets and liabilities of said company includes all the assets and liabilities of the said company up to and including the date of July 20th, 1893, as the same appear on the books of said company, and that said list includes all the liabilities of the said company at the date afore-
37 said, and that said affidavit was signed and sworn to by said McCormick July 20th, 1893, before a notary public, in Cook County, Illinois, which statement was accurate in every respect.

Furthering answering the defendants deny that said William G. Crimp relied wholly on the aforesaid statement of said R. P. McCormick as to the condition of said drainage work and said corporation and they deny that he relied especially upon the said sworn statement of the assets and liabilities of said corporation and said promises to pay them, and they deny that he was induced by

said McCormick to pay over to him in trust to be applied to the uses and purposes expressed in said contract, the sum of twenty-three thousand dollars ($23,000) in cash and thereafter to pay a further sum of fifty-two hundred dollars ($5.200.00) in cash or any other sum; but on the contrary, said defendants aver that said Crimp entered into said contract after a full and careful investigation of the condition of said company as aforesaid, and was not induced by the said McCormick or any other person except the said Sexton to execute said contract, but executed the same of his own free will and accord, except as induced by said Sexton and only after such full and careful investigation, and paid over to the said McCormick on account of the said stock the sum of twenty-three thousand dollars ($23,000.00) by checks, made payable to the said McCormick Construction Company at the instance and request of said McCormick. And defendants aver that at the
38 time of the execution of said contract the said McCormick was credited on the books of the said company with the sum of twenty-five thousand two hundred dollars ($25,200.00) and the said Crimp was debited with said sum of twenty-five thousand two hundred dollars ($25,200.00). Defendants aver that the sum of twenty-three thousand dollars ($23,000.00) has been credited to the said Crimp on the books of said company and that there remains due to said company from the estate of the said Crimp the sum of twenty-two hundred dollars ($2,200.00).

Defendants further aver that there is due from the said estate to the said company the further sum of seven thousand dollars ($7,000.00) in accordance with the terms of the contract between the said Crimp and the said McCormick and the McCormick Construction Company, as set forth in the eight (8th) paragraph of said contract.

Further answering defendants admit that said contract was executed by said corporation and that a resolution confirming said contract was passed by the board of directors of the said corporation defendant.

Further answering, the defandants deny that said Crimp was drawn into said transaction unless it was by said Sexton, but admit that about four (4) weeks after the execution af said contract the said Crimp became ill. Defendants deny that said Crimp was never able to, and that he never did visit said drainage work more than a few times, but aver that for several weeks after the signing of the said contract the said Crimp made frequent visits to the

Answer.

drainage work and that he was fully acquainted with the true
39 condition of the said corporation and the doings of the said defendants McCormick and McCormick Construction Company before the said contract was made and for a considerable—— thereafter. Defendants neither admit nor deny that the said illness of the said William G. Crimp continued to increase and that he was confined to his bed, they neither admit nor deny that on the 14th day of November, 1893, he died leaving a last will and testament as set forth in said bill of complaint and that said complainant's will was duly proved in the probate court, but as to these matters they leave complainant to her proof.

Defendants further answering deny that owing to the illness of the said Crimp he was compelled to and did trust entirely to said McCormick and said company to dispose faithfully of the sums of money alleged to be confided to their hands by him in extinguishing said debts and carrying on said drainage work effectively, but on the contrary said defendants aver that soon after the signing of the said contract and early in the month of August one John Reilly, a nephew of said Patrick J. Sexton, was placed in the office of said company by the said Crimp and the said Sexton as their representative and that thereafter the said Reilly was in a position to know and did know all of the affairs of the said company and all the doings of the said defendants McCormick and McCormick Construction Company and the defendants aver that before the making of the said contract and since the making thereof the said Patrick J. Sexton had acted as the confidential advisor of the said William G. Crimp and the said Eugenia Crimp and that during the month of August and shortly after the appointment of his said nephew Reilly as such assistant the said Sexton was by the said William G. Crimp made his agent to act for him, the said William G. Crimp and
40 these defendants were informed by the said Crimp and the said Sexton, and that said Sexton has since said time been acting as the agent of said William G. Crimp and said Eugenia Crimp in matters pertaining to the said contract and the said Sexton claimed to have a power of attorney from the said William G. Crimp to act for him in that behalf. Defendants deny that since November 14, 1893 complainant has at all times done and been ready and willing to do all things required by equity to be done by her, and defendants deny that complainant is still ready and willing to do equity in the premises, but the said defendants aver that the said William G. Crimp and the said Eugenia Crimp have repeatedly refused and neglected to perform the things required by their said agreements to be performed by them and as in equity they ought to have done.

Answer.

Further answering the said defendants deny that said defendant McCormick continued and intended to defraud the said William G. Crimp and they deny that he ever applied the said sum of twenty-three thousand dollars ($23,000) to the payment of the debts or liabilities of the corporation set out in said schedule, but they admit that the McCormick Construction Company paid the sum of four thousand dollars ($4,000) upon the debt owing to the Northwestern National Bank, they aver that the said sum of four thousand dollars ($4,000.00), together with the balance of the indebtedness to the said Northwestern National Bank, should
41 under said contract have been advanced by the said William G. Crimp which the said William G. Crimp and the said Eugenia Crimp totally neglected to do to the great injury of the said defendants.

Defendants aver that the said sum of twenty-three thousand dollars ($23,000) was turned over and advanced by the said McCormick to the said McCormick Construction Company and by the said McCormick Construction Company paid out in liquidating the just debts and liabilities of said company, and defendants aver that after the execution of said contract with said Crimp a parole contract was entered into between said Crimp and said McCormick Construction Company in and by which out of the said sum of twenty-five thousand two hundred dollars ($25,200.00) which was to be paid for said stock, the sum of ten thousand dollars ($10,000.00) and interest amounting in all to about the sum of ten thousand three hundred and fifty dollars ($10,350.00) was paid by said company to one George H. Frost to liquidate the debt of said company for said amount to said McCormick, which amount said McCormick had theretofore borrowed from said Frost and advanced to said company and given to said Frost as collateral security therefor, stock of said company belonging to said McCormick of the par value of thirty thousand dollars ($30,000.00).

Further answering these defendants deny that the averment which said McCormick made and swore to as set forth in said bill was wholly untrue in fact, and they deny that there were other alleged liabilities of said company on July 20th, 1893, and deny that said written statement of assets grossly and wilfully overstated the value of said assets and deny that the said statements
42 were false, and that they were made solely with the intent to get hold of the said money of said Crimp under said alleged trust as set forth in said bill and deny that said McCormick never

Answer. intended to apply according to said agreement, but converted the same or any part thereof to his own use and to prevent the carrying out of said drainage contract and thereby prevent said Crimp from ever getting anything out of his investment. And defendants deny that said McCormick took advantage of said alleged trust and confidence which the said Crimp reposed in him and of his said illness to commit and cause said company to commit a total breach of said alleged trust and utterly wreck and ruin the business of carrying out said contract with said sanitary district, but on the contrary defendants aver that there was no trust whatever created in and by said contract or in the subsequent transactions of said parties and that all statements made to said Crimp leading up to the formation of said contract were literally true.

Further answering these defendants admit that a few days after said Crimp signed said contract said McCormick handed him a paper having the seal of said company affixed and certified by him and said Waugh to be a correct copy of a resolution of said company making said Crimp a director and vice-president of said company and providing that all checks should be signed by the president and countersigned by the vice-president of said company, and said defendants aver that the said resolution was duly passed by the board of directors of said company as set forth in said
43 certificate.

Further answering these defendants admit that said contract provides that said Crimp might furnish a suitable representative in the office of said company as assistant in its management and that one John Reilly being the Reilly hereinbefore referred to, and nephew of the said Patrick J. Sexton, was duly appointed by the said Crimp and the said Sexton as assistant in said management, but these defendants deny that the said Reilly was in any manner a suitable representative of assistant in the management of the said company, and aver that said Reilly from the time of entering upon his duties as such representative constantly worked in the interests of said Sexton and said Crimp and not for the best interest of said company. And these defendants admit that it was arranged with the Northwestern National Bank of Chicago, that all checks of said company should be countersigned by said Reilly as well as signed by said president, and that after said time all checks issued by said company were so signed by said Reilly in behalf of said Crimp.

Further answering these defendants deny that said McCor-

mick converted eleven thousand six hundred dollars ($11,600.00) Answer.
or any other part of the twenty-three thousand dollars ($23,000.00) paid him by said Crimp, to his said McCormick's own use before said arrangement was made for said Reilly to countersign said checks or at any other time, but aver that nearly said sum of eleven thousand six hundred dollars ($11,600.00) was paid out of said sum of twenty-three thousand dollars ($23,000.00) to said George H. Frost,
on account of said McCormick as heretofore stated and at the
44 suggestion and with the concurrence and approval of said Crimp.

Further answering, defendants deny that said McCormick some few days before said Crimp's death or at any other time called at the house of said Crimp and demanded the sum of four thousand dollars ($4000) in cash, but defendant McCormick admits that on or about the 8th day of November, 1893, at the suggestion and request of the said Patrick J. Sexton, he the said McCormick called upon the complainant, Eugenia Crimp, at the house of said William G. Crimp, and conferred with her with regrad to the payment of the four thousand dollars ($4000) due from the said Crimp to the said McCormick Construction Company according to the terms of his said contract, and at that time stated to the complainant that unless the company was paid the amount due it from the said Crimp, the creditors would commence proceedings against it and tie up its property, and thus prevent the completion of the said contract with the said sanitary district, to the great loss of the said Crimp and the said defendants, whereupon said complainant replied to said McCormick that she would confer with said Sexton and see him, the said McCormick, the next day in regard to said matters, and on the following morning the said McCormick called at the house of the said Crimp and was informed that the said complainant was in conference with the said Patrick J. Sexton, that subsequently on the same day he called again at the house for the purpose of interviewing the complainant and was informed that the complainant would not see him, and the said
defendant, McCormick, avers that these are the only visits
45 made by him at the house of said Crimp with respect to the payment of the said sum of four thousand dollars ($4,000) and the defendants aver on information and belief that the said Sexton in pursuance of his conspiracy to defraud the said defendants, advised the complainant not to pay the said sum of money to the defendant McCormick Construction Company, and that the advice of said Sexton was given for the purpose of preventing the carrying out of the contract of the McCormick Construction Company with

Answer. the said sanitary district and of compelling the said McCormick Construction Company to transfer its interest in said contract to the said Sexton or one or more of his co-conspirators. And these defendants deny that said McCormick sent to said complainant any threatening letters whatever, but that any letters sent by said defendants to the camplainant and to the said William G. Crimp or his representatives were business like and merely stated the facts with a view to securing the just rights of said company under said contract.

Further answering these defendants deny that the said McCormick on the 11th day of November, 1893, in order to get out seventy-four hundred dollars ($7,400) from the Northwestern National Bank, drew a check for seventy-four dollars ($74) and got Reilly to countersign it, and they deny that he then fraudulently altered said check to read seventy-four hundred dollars ($7,400) and they deny that he has cancelled said sum of seventy four hundred dollars ($7,400), and converted it to his own use, but they aver that on the 10th day of November, 1893, the said McCormick drew a check in the amount of seventy-four
46 hundred dollars ($7,400) upon said bank and that the same was countersigned by the said Reilly in behalf of said William G. Crimp, vice-president, and on the following day said McCormick drew the money upon said check in order to save the same from threatened attachment, and soon to pay the pay roll of said company.

Further answering defendants aver that still having said sum of money in his possession, said McCormick on the 14th day of November, 1893, proceeded to the camp of the said McCormick Construction Company near Lockport, in the county of Will in the said State of Illinois, for the purpose of paying the employes of said company, and that on the evening of said 14th day of November, while at Lockport, or on his way from Lockport to the said camp, said money was taken from him by some person or persons to him unknown and without the fault, design or procurement of said McCormick, since which time the said McCormick has not had possession of said money, or any portion of it, nor has he seen the same, and he does not know where the same now is.

Further answering defendants admit that the said McCormick came into the office of the chief of detectives of the Chicago police, in the city hall, in Chicago, Illinois, on or about the morning of November 15, 1893, but the defendants aver that at said time the

said McCormick was under great mental excitement and in an ab- Answer
normal condition and that he was sick in mind and body, and that his condition as he verily believes was brought about by the administering to him in his food or drink of poisonous drugs
47 or concoctions which had theretofore and on the afternoon and evening of the 14th day of November, 1893, been administered to him by some person or persons unknown as the said defendant McCormick believes and that as a consequence of the administering of said drugs said defendant McCormick was sick and confined to his bed for a period of eight (8) days thereafter. Said defendant McCormick admits that he stated to said chief of detectives that he had been robbed, but strenuously denies and charges as false and malicious, the allegations in said bill that what he said about being robbed was a falsehood concocted by himself. The defendants admit that since the making of said contract with said Crimp, said McCormick in behalf of said McCormick Construction Company has collected a considerable sum of money from the said sanitary district, but they deny that he never paid the indebtedness mentioned and agreed to be paid by him and the said McCormick Construction Company out of the moneys advanced by the said Crimp. Further answering the defendants admit that on or about November 15th, 1893, the work under said drainage contract was discontinued, and that nothing has been done on it since and that notice was given to the said McCormick Construction Company by said sanitary district on or about November 17th, 1893, that there has been a substantial failure on its part to comply with said drainage contract as to the progress of the work and that said notice was served for the purpose of laying the foundation for the forfeiture of said contract, and that said sanitary commission proposes and intends to forfeit the said contract on or about December 16th next unless work is resumed at once and carried on according
48 to its terms, but the defendants aver that the cessation of work was caused and brought obout by the neglect and refusal of the said William G. Crimp and the said complainant, Eugenia Crimp, to perform their agreements with the said defendants and by the unwarranted interference and conspiracy of the said Patrick J. Sexton.

Defendants deny that said McCormick has been often or at any time requested by complainant to account for the said money and go on with the said drainage work and to call a meeting of the directors of the said company and give complainant control of said corporation and said work in order that she may try and make something to apply on the said twenty-eight thousand two hundred dollars ($28,200.00) as recited in said bill.

Answer.

Defendants neither admit nor deny that divers friends of said Crimp and complainant are financially and otherwise able to complete the said contract for her benefit if she can have control and that they have promised to do so, and that they and complainant have so notified said McCormick, but as to these matters they leave the said complainant to her proof.

Defendants deny that said McCormick has refused or that he still refuses to do any of the things alleged to have been requested of him or to do anything to help the complainant or any one interested.

Defendants have no means of knowing what the fears and beliefs of the complainant may be, but they deny that the said defendant, McCormick acting with the said Waugh have any intention or that he will injure or destroy any interest or assets of the
49 said company. And they deny that the said Waugh is wholly or in any manner under the control of the said defendant McCormick.

Defendants deny that said McCormick has in any way injured or insulted the family of the said William G. Crimp, or that he has or does now demand of the complainant the sum of twenty-five thousand dollars ($25,000.00) as the consideration for calling a meeting of the directors of said company.

Further answering defendants admit it is for the best interest of the parties concerned in said contract to at once devise means to carry out said drainage contract and the said drainage contract is a very valuable asset if promptly and effectively carried out and a forfeiture prevented. And they aver that said McCormick was negotiating to procure the requisite means so to carry out said contract shortly prior to the filing of said bill, and that he would have been successful in that behalf if said bill had not been filed and if the said complainant had been willing to accept what in equity and in good conscience she was entitled to receive if anything under the contract entered into by the said William G. Crimp, and these defendants and if the said Sexton and others had not so interfered and conspired to defraud these defendants. And defendants further aver that said McCormick and said McCormick Construction Company are still able and willing to provide such means for the purpose aforesaid and to carry on said contract if they are permitted to do so.

Further answering defendants deny that said McCormick is wholly insolvent and without character or means, and deny that said company has not and never had any property or assets equal to its liabilities except said drainage contract. But they admit that said drainage contract is particularly a worthless asset unless at once proceeded with. Answer.

Defendants aver that the said McCormick is a man of large experience in contract work, such as was undertaken by the McCormick Construction Company with the Sanitary District, that the fact that he was known to be a man of such experience was what induced the said William G. Crimp to enter into his said contract.

Further answering defendants admit that the materials, tools and property of all kinds which had been used in said drainage contract work are likely to be injured or destroyed unless some suitable person is appointed to take charge of the same at once, but they deny that said receiver should be appointed without notice to the said corporation or to said McCormick, and an injunction issued against interferences with the same, but on the contrary, they aver that the appointment of said Sexton as receiver without notice to said corporation or to said McCormick was a gross injustice practiced upon the defendants and will work irreparable injury to them unless he shall at once be removed.

Further answering the defendants deny that the McCormick Construction Company is and always has been together with said drainage contract a mere sham concern used by said McCormick and said Waugh, solely for the purpose of helping said McCormick to defraud persons in this or any other contract. And they deny that if said corporation or McCormick or Waugh or any one in their interest had been notified of an application for an injunction or receiver, that they or either of them would have by individual acts destroyed or made way with any books, papers, property or anything which was accessible to them or that the complainant would be injured or that her rights would be prejudiced, unless said injunction had been issued and said receiver had been appointed upon the filing of said bill of complaint as prayed for therein.

Defendants admit that some of the creditors of said corporation have obtained possession of a large amount of tools, machinery, mules and other property of the said corporation used for and

Answer. necessary to the carrying out of said contract, but they do deny that it was done by the procurement of the said defendant McCormick.

On the contrary, the defendants aver that the action of the creditors of the said McCormick Construction Company was brought about by the failure on the part of the said William G. Crimp and the complainant, Eugenia Crimp, to perform their agreements with the defendants and by unwarranted interference and conspiracy of the said Patrick J. Sexton. They neither admit nor deny that the said creditors would be willing to surrender all or any of said property to a receiver, but they aver on information and belief that the creditors have no confidence in the integrity and honesty of the receiver appointed herein and that they will be unwilling to surrender to him any of the said property. But the defendants aver that the said creditors would prefer that the
52 receiver, if one should be appointed, be an honest, impartial and disinterested person.

Further answering the defendants deny that the complainant has offered to said McCormick and said company to retain all or any of the certificates of stock and contract in her possession or to do all that equity requires if the said money is paid and the contract rescinded.

Further answering defendants deny that the said complainant is entitled to have said contract with said defendants set aside and annulled for fraud in obtaining it and they deny that any fraud was practiced in the making of said contract by said defendants or in any transaction leading up to the same.

Defendants further deny that said complainant is entitled to have said contract performed or to have a remedy for any gross breaches of alleged trust alleged to have been committed with reference to the said contract and the said funds alleged to have been intrusted to said McCormick and said corporation and they aver that no breach of trust, if any exists, has been committed by the defendants or either of them.

Further answering defendants aver on information and belief that the said Patrick J. Sexton was at the time of the execution of said contract by the said William G. Crimp, and the said defendants a partner of the said Crimp and that he still continued to be

such partner up to the time of the said Crimp's death and that under a secret arrangement between the said Sexton and the said Crimp the said Sexton was to furnish a portion at least of the money contracted to be advanced by the said Crimp and was to share with the said Crimp in the profits realized out of and by reason of the said contract. Answer.

53 Defendants further answering says that if a proper accounting were had between him and the defendant, McCormick Construction Company, it would be ascertained that it is a fact that said McCormick Construction Company is indebted to the said McCormick in a sum not less than twenty-eight thousand dollars ($28,000.00).

And having fully answered the defendant's, pray to be hence dismissed with their reasonable costs in this behalf most wrongfully sustained.

RICHARD P. MCCORMICK.
MCCORMICK CONSTRUCTION CO
By R. P. MCCORMICK, President

Petition of Consolidated Coal Co.

J. V. BROWN,
W. D. WASHBURN and
THOMAS C. CLARK,
Solrs. for Defendants and of Counsel.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Eugenia Crimp, Executrix, etc.,
vs.
McCormick Construction Co. *et al.* } 664-23, 174

63 Intervening Petition of Consolidated Coal Company of St. Louis, a corporation.

To the Honorable Judges of said Court:

Your petitioner, Consolidated Coal Company of St. Louis, a corporation organized and existing under the laws of the State of Illinois, respectfully shows unto your honors that heretofore, to wit, on the fourth day of December A. D. 1893, Eugenia Crimp, executrix of.....Crimp, deceased, filed her bill of complaint herein against the said McCormick Construction Company and R. P
64 McCormick, praying for the annulment or specific performance on the part of said McCormick Construction Company and R. P. McCormick of a certain contract therin set forth, dated July 24, 1893, between.....Crimp, deceased, of whose estate said Eugenia Crimp has been appointed executrix and said McCormick Construction Company, that an injunction be issued in accordance with the prayer or said bill and that a receiver be appointed to take charge of the goods, chattels and effects of the said McCormick Construction Company, all of which is more particularly set forth in said bill to which reference is hereby made.

Your petitioner further shows unto your honors that it is a creditor of the said McCormick Construction Company, one of the said defendants, for coal sold and delivered at various times, a statement of which indebtedness is hereto attached and marked "Exhibit A." That, on, to-wit, the fourteenth day of November A. D. 1893, your petitioner commenced its suit in attachment for the amount of its then existing claim against said McCormick Construction Company, to wit, $1,400.00 in the Circuit court of the county of Will and State of Illinois, against said McCormick Construction Company, filed its bond therein, and, therefore, on the same day a writ of attachment from said Circuit court of Will
65 county issued against the goods, chattels and effects of said

McCormick Construction Co., and upon this same day, to wit: November fourteenth, 1893, the sheriff of Will County returned said writ and levied the same upon all of the property of said Mccormick Construction Company, in the town of Lockport and county of Will, all of said property consisting of live stock, machinery and apparatus in use by said McCormick Construction Company upon section fourteen (14) of the drainage canal at Lockport, Will County, Illinois. That, at the time of said levy, part of said property levied upon was in the supposed custody of a mortgagee, and said levy was made as to such property subject to the rights, if any, of said supposed mortgagee. That under and by virtue of said levy and continued possession thereunder by the said sheriff under said attachment, your petitioner is entitled to a lien upon said property so levied upon, and is entitled to have its said claim paid to it out of the estate of the said McCormick Construction Company.

That your petitioner as to the allegations in said bill of complaint concerning the contract between the McCormick Construction Company and the Board of Trustees of the Sanitary District of Chicago, is uninformed and believes that the same are true in substance and fact, and your petitioner is informed and believes that said contract with the trustees of the Sanitary District of Chicago, is in danger of being forfeited, as stated in said bill, and generally your petitioner represents the facts to be substantially as is set out in said bill.

66 Your petitioner therefore prays that it be made a party defendant to said bill of complaint, and that it be allowed to join in the prayer of said bill for receiver and injunction. That this honorable court will in its decree herein find and certify as to the amount due from McCormick Construction Company to your petitioner, and that the claim of your petitioner may be declared a lien upon the property of said company, and that your petitioner be entitled to receive from the receiver appointed herein the amount of its claim aforesaid.

Your petitioner further prays that said Eugenia Crimp, complainant herein, said McCormick Construction Company and R. P. McCormick be directed to answer this petition by a short day to be appointed by this court, and your petitioner will ever pray.

THE CONSOLIDATED COAL CO. OF ST. LOUIS.
By HAMILTON ANDERSON,
Agent.

Afterwards, to-wit, on the fourth day of January, 1894, came P. J. Sexton, receiver, and files in the clerks office of said court his report, which said report is in the words and figures following, to-wit:

68 RECEIVER'S REPORT.

UNITED STATES OF AMERICA, }
NORTHERN DISTRICT OF ILLINOIS. } ss.

In the matter of receivership in Crimp *vs.* McCormick Construction Company.

REPORT OF RECEIVER.

To the Honorable Judges of the Circuit Court of the United States, in, and for the Northern District of Illinois, in Chancery Sitting:

Receiver's Report, filed Jan. 4, 1894.

Comes now P. J. Sexton, receiver, respectfully begs leave to report to the court his doings and proceedings as receiver in the order of appointment heretofore made and petitions the court for direction, power and authority as hereinafter set forth.

Your petitioner says that on December 4th, 1893, Eugenia Crimp, of the City of Chicago, filed her bill against the McCormick Construction Company, of St. Louis, of the State of Missouri, and R. P. McCormick, a citizen of said state, praying
69 among other things that a receiver be appointed to take charge of the property, books, papers and affairs of the said McCormick Construction Company.

Your petitioner further says that on the 4th day of December, 1893, this honorable court appointed this petitioner as receiver to so take charge, control and custody and that as said receiver your petitioner duly qualified and proceeded upon his duties as said receiver.

That your petitioner immediately commenced the investigation of the condition and affairs of the McCormick Construction

Company as to its liabilities and assets, made and caused to be made examinations of the books, papers and accounts of the defendants, the McCormick Construction Company, R. P. McCormick and also W. P. Waugh, and there was employed to aid him in said investigations and researches an expert accountant. That your receiver found upon investigation that the said construction company has certain personal property situated in Will County, Illinois, used in the work of drainage and excavation under a certain contract with the Sanitary Commission of Chicago.

71 All of which aforesaid property hereinbefore described and set forth being and is situated in the township of Lockport on section fourteen (14) of the Chicago Drainage Canal, in Will county, State of Illinois, and in the town of Lockport, and other machinery, tools, appliances and fixtures and property used and intended to be used in connection with the work done and
72 to be done under the contract of July 12th, 1892, with the Sanitary District of Chicago.

Said McCormick Construction Company had also certain rights under a contract for excavating a certain portion of the main drainage channel, removal of earth, rock, glacial drift and other material from that portion of the said main drainage channel known and distinguished in said contract as section 14, including the right to money reservations provided for in said contract.

Said contract was made and entered into on the 12th day of July, 1892, by and between the Sanitary District of Chicago, party of the first part, and said McCormick Construction Company, party of the second part. And your petitioner says that it has appeared that not nearly enough work has been done by the said company under said contract to comply with the terms of the same and that on or about November 17th, 1893, said sanitary district had served notice of its intention to forfeit said contract at the expiration of thirty (30) days.

Your petitioner also found that the said sanitary district had resolved to forfeit the rights of the said McCormick Construction Company under said contract unless very prompt measures were taken to proceed with and consumate said work. That said work was very expensive and difficult and said district was insisting upon and is insisting upon competent men to proceed with the execution of the work under said contract as well as ample security that said

work will be finished in compliance with the terms of said con-
73 tract in case such contract should not be forfeited as heretofore threatened.

Your petitioner further says that the personal property above described and the rights under said contract were the only property including the right to certain moneys reserved under said contract and now held by said sanitary district rights and credits which your petitioner has been able to discover as belonging to the said McCormick Construction Company, except certain books and papers now in the custody of E. S. Sherman, master in chancery of this court for your petitioner.

Your petitioner further says that upon the personal property, exclusive of said contract there was a chattel mortgage executed by the said McCormick Construction Company to the Ingersoll-Sergeant Drill Company, the Northwestern National Bank, the Moses P. Johnson Machinery Company and Parker, Belcher and Ingraham of about the sum of fifteen thousand dollars ($15,000.00).

That shortly before the commencement of this suit said mortgagees had placed a custodian in charge of all said personal property and that said custodian still remains in possession.

Your petitioner further shows that so far as he has been able to ascertain there are claims against the said Construction Company to the amount of about thirty thousand dollars ($30,000) but what amount is justly due and owing on said claims he is not yet able to ascertain. That while the said Sanitary District have not agreed not to forfeit the contract hereinbefore mentioned, still in case it shall be assigned to persons competent to fully carry out the terms and conditions of said contract and that good and
74 sufficient security be given to said district for the completion of said work, your petitioner has reason to believe that said district will consent to such assignment, but that unless such persons are found to whom this contract may be assigned and such security furnished it is probably that said contract will be forfeited and all rights thereunder lost.

Your petitioner further says that it seemed best to this court that the rights under said contract should be sold and that the plant and personal property be described in paragraph .....of this report should be sold and on the 14th day of December, 1893, this court ordered that such rights and such property should be sold and dis-

Receiver's Report, filed Jan. 4, 1894

posed of and that the fund arising from said sale should be held subject to the further order of this court. That due notice of said order having been given, your petitioner took steps to find possible purchasers and used diligence in notifying persons who might probably desire to purchase said property. On January 2nd, 1894, the said property and rights were put up at public auction to be sold to the highest and best bidder. That several bids were made to the court and that finally upon the 2nd day of January, 1894, the firm of Ezekiel Smith and Joseph Eastman, doing business as Smith & Eastman, offered for the personal property and plant described in paragraph———of this report with clear title free from all incumbrances the sum of $8,000.00, and said Smith and Eastman offered the sum of $33,000.00 for the contract and rights of the said McCormick Construction Company and the said R. P. McCormick under said contract of July 12, 1892, including all money reservations and powers, rights and privileges appertaining thereto free from all claims thereupon.

Your petitioner says that the said Smith and Eastman are willing and able to furnish the security required by said Sanitary District and that your petitioner believes that the offer of Smith and Eastman is the highest and best bid for said property and he recommends that the proper conveyances be made to them of the property and rights hereinbefore described.

PATRICK J. SEXTON.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

I, P. J. Sexton, being first duly sworn depose and say that the allegations made in the foregoing report have been read to me and that I verily believe them to be true.

PATRICK J. SEXTON.

Subscribed and sworn to before me this 4th day of January, A. D. 1894.

JOS. H. HUHN,
Notary Public.

[SEAL.]

[Endorsed]: Filed Jan. 4, 1894.

S. W. BURNHAM,
Clerk.

Afterwards, to-wit, on the Fifth day of January, 1894, in the December term of said court, 1893, in the record of proceedings thereof, in said entitled cause before the Hon. Peter S. Grosscup, District Judge appears the following entry, to-wit:

76 ORDER OF COURT.

Eugenia Crimp
vs.
McCormick Construction Company and R. P. McCormick. } *In Chancery.* 23,174.

Record Entry.

This cause came on to be heard on the report of the receiver, Patrick J. Sexton, filed in said case, the records and files of same and documents submitted in open court, in presence of counsel for the respective parties, and counsel for the Sanitary district of Chicago, and counsel for Ingersoll-Sergeant Drill Company, Moses P. Johnson Machinery Company, Parker, Melcher and Ingraham, and Northwestern National Bank of Chicago, parties holding mortgages upon certain property of defendant McCormick Construction Company mentioned in said report and counsel for certain persons having claims against said company, viz.:

And it appearing to the court that the statements in said report of said receiver are substantially true and due notice of sale has been given, and that it is for the best interests of all parties to this suit and all claimants against said McCormick Construction Company, that the contract of said company with the Sanitary District of Chicago, mentioned in the bill of complaint and said report, together with all money, reservations and powers, rights and
77 privileges appertaining thereto, be sold by said receiver to Ezekiel Smith and Joseph Eastman, the highest and best bidders, free from all claims thereon, for the sum of thirty-three thousand dollars cash, and that the property mentioned in said report constituting the plant, etc., of said company be also sold to said Ezekiel Smith and Joseph Eastman with clear title, free from the claims of all and singular the persons having or claiming to have a mortgage or mortgages, or liens, or incumbrances, or claims of any kind upon said property, for the sum of eight thousand dollars cash, in accordance with the bid of said Smith and Eastman and said parties holding said mortgages appearing in open court by

their respective counsel and agreeing that said sale may take place and all their rights and claims as mortgagees may be transferred from said property to the fund of eight thousand dollars bid for same, and that they will, upon said sale being made, turn over to said purchasers all and singular the property held in custody by or for them.

Thereupon, on motion of counsel for complainant, and no objection being made by any one, it is ordered adjudged and decreed that both of said bids of Ezekiel Smith and Joseph Eastman be accepted, and said contract executed on the twelfth day of July, A. D. 1892, by and between said McCormick Construction Company and the Sanitary District of Chicago, stipulating for the performance by said company of certain work on Section 14 of the Drainage Canal now being constructed by said Sanitary District of Chicago, together with all rights said company has in to or under said contract, be sold to said Ezekiel Smith and Joseph East-
78 man for said thirty-three thousand dollars, and all property and assets constituting all the fixtures, machinery, buildings and property of all kinds of said corporations, situated in Will County, Illinois, be also sold to them for said eight thousand dollars, with free and clear title as aforesaid, and that said Smith and Eastman do pay over said sums of money to said receiver, and receive from him, said contract and property, and such bill of sale or assignment or instruments of writing as may be proper to convey title by said receiver to them.

And it is further ordered, adjudged and decreed that said sale shall not in any way invalidate or impair any right or claim of any person, whether parties of record in this suit or not against the defendants or either of them, except as to any specific property, or assets sold, but the moneys arising from such sale shall stand in the place of such property or assets sold.

And that all the rights, liens and equities of said respective mortgagees and of any other lien claimants be and they hereby are transferred to and preserved against said fund of eight thousand dollars the same as they now exist against said mortgaged property herein ordered to be sold for that sum, but without prejudice to all equities of said mortgagees as general creditors of said McCormick Construction Company after exhausting priorities, if any, against said fund of eight thousand dollars and with leave of court hereby given to intervene in this cause in behalf of their respective interests in the premises. Provided, however, that for the better securing

Record Entry.

the due performance of said contract with said Sanitary District of Chicago, to its satisfaction, said Ezekiel Smith and Joseph Eastman, shall before being substituted to the rights of said company under said contract give bond to said parties, and said Patrick J. Sexton shall, in addition thereto guarantee the due performance of said contract by said Smith and Eastman as may be required by said Sanitary District (the said Sexton here in open court consenting to do so.)

79

And it is further ordered that all creditors of said defendant McCormick Construction Company, so far as their names and addresses can be ascertained, shall be at once notified by E. B. Sherman, a Master in Chancery of this court, that the contract of said company with the Sanitary District of Chicago, and the machinery, fixtures, etc., constituting its plant, and other property in Will County, Illinois, have been sold for the sum of forty-one thousand dollars, and that all creditors and persons having claims or demands of any name or nature against said company may appear before said master and present same before the 20th day of January, 1894, in the usual form of notice in such cases, and said master may receive and report to the court, such evidence as may be given before him for or against or respecting said claims and demands:

On the same day to wit the fifth day of January, 1894, in the December term of said court, 1893, in the record of proceedings thereof in said entitled cause before the Hon. Peter S. Grosscup, District Judge, appears the following entry, to-wit:

80 ORDER OF COURT.

Eugenia Crimp
vs.
McCormick Construction Company *et al.* } *In Chancery 23174.*

Record Entry.

It is ordered that complainant have leave to file her amended and supplemental bill instanter in this case, making certain mortgagees parties defendant hereto: And that said parties named as defendants in said amended and supplemental bill do enter their respective appearances in writing and plead or answer same within ten days.

81 On the same day to wit: the fifth day of January, 1894, came the complainant in said entitled cause by her solicitor and filed in the clerks office of said court (by leave of court first had and obtained) her amended and supplemental bill, which said amended and supplemental bill is in the words and figures following, to wit:

Amended and Supplemental Bill.

In the Circuit Court of the United States, for the Northern District of Illinois.

Eugenia Crimp,
vs.
McCormick Construction Company and R. P. McCormick. } *In Chancery.*

Amended and Supplemental Bill, filed Jan. 5, 1894.

Amendment and supplement to the bill of complaint in this cause, made pursuant to an order of court.

Complainant respectfully states that on December 4th, 1893, she filed her original bill of complaint herein against the McCormick Construction Company and R. P. McCormick, defendants and a restraining order was granted against defendants, and a receiver was appointed and a subpœna to answer said bill was returned served upon both of said defendants, as appears by the records in said case.

Your orator now states that she has been informed and believes since the filing of her said bill, that Ingersoll-Sergeant Rock
82 Drill Company, Moses P. Johnson Machinery Company, M. Parker, Melcher and Ingraham and Northwestern National Bank of Chicago who are citizens of New York, Missouri and Indiana respectively and said bank incorporated under laws of the United States, did on or about November 13th, 1893, obtain from defendant, R. P. McCormick, and W. P. Waugh a certain chattel mortgage upon divers property of said McCormick Construction Company, consisting of tools, machinery, buildings, and all of the tangible property of said company, situated in Will county, Illinois, and used in the carrying on of the drainage excavation work under

Amended and Supplemental Bill, filed Jan. 5, 1894.

its contract with the Sanitary District of Chicago mentioned in said bill.

The alleged debt to said Ingersoll Rock Drill Company being $9,000,00, to Moses P. Johnson Machinery Company $1,742, to Parker, Melcher and Ingraham $750 and to Northwestern National Bank $3,000, whether or not said chattel mortgage is a good and subsisting lien upon said property, to any or what extent, your orator cannot say, but prays that the question may be determined by this court.

Complainant further states that said receiver found said property in the possession of a custodian for said above named persons claiming as mortgagees, who had advertised said property for sale under said alleged mortgage, and they are still in possession of same.

83 Said receiver also learned that unless prompt measures were taken to have said work carried on by good and responsible persons, said Sanitary District would forfeit said contract with the defendant, McCormick Construction Company, in accordance with notice stated in the bill of complaint. Said receiver thereupon was ordered by this court to secure offers for the purchase of said contract, reserve fund and other rights under it, and also for the purchase of said property of said company in the hands of said custodian, and he has received divers offers, the highest amounting to $33,000 for said contract, reserve fund, and rights under it, and $8,000 for said property in hands of the custodian.

Complainant states that unless said sale can be made by said receiver, there can be nothing obtained from the assets of said defendant company for any party or creditor (unless some few thousand dollars by sale by said mortgagees) and all advantages of said contract with said Sanitary District will be wholly lost.

The premises considered complainant prays that said mortgagees may be made parties defendant to this bill and be required to answer same, but not under oath, their oaths and the oaths of each of them being expressly waived, that said receiver may be directed to complete the sale of said assets to the highest bidder free from said mortgage and all liens of every kind, and that the proceeds arising from said sale may be distributed by the court,
84 according to the rights of all persons concerned, after due investigation of all claims, and that the priorities of all

claimants may be determined and any rights they or any of them may be held to have in anything so sold may be transferred to the proceeds of said sale, and for such other and general relief as may be proper in equity. Amended and Supplemental Bill, filed Jan. 5, 1894.

EUGENIA CRIMP,
By A. S. BRADLEY,
Her Sol'r & Counsel.

A. S. BRADLEY,
Sol'r.

[Endorsed]: Filed Jany. 5, 1894.

S. W. BURNHAM,
Clerk.

Afterwards, to wit on the fifteenth day of January, 1894, came Parker, Melcher & Ingraham and Moses P. Johnson Machinery Company, by their solicitors, and filed in the clerk's office of said court their joint and several answer to the original and amended and supplemental bills of complaint of complainant, which said answer is in the words and figures following, to wit:

ANSWER OF PARKER, MELCHER & INGRAHAM *et al.*

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.—IN CHANCERY.

Eugenia Crimp, Executrix, etc.,
vs.
McCormick Construction Company and R. P. McCormick.

Gen. No. 23,174.
Term No. 664.

The joint and separate answer of Parker, Melcher & Ingraham, a corporation organized and existing under the laws of the State of Illinois, and Moses P. Johnson Machinery Company, a corporation organized and existing under the laws of the State of Missouri, defendants, to the original and amended and supplementary bills of Eugenia Crimp, executrix, etc., heretofore filed herein. Answer of Parker, Melcher & Ingraham.

Answer of Parker, Melcher & Ingraham.

These defendants now and at all times hereafter saving and reserving unto themselves all benefit or advantange of exception which can or may be had or taken to the many errors, uncer-
86 tainties and other imperfections in said bills contained for answer thereunto, or to so much and such parts thereof as these defendants are advised it is material or necessary for them to answer, answering say:

These defendants admit that on December 4, 1893, Eugenia Crimp, executrix, filed her bill in this court against the McCormick Construction Company and the Moses P. Johnson Machiery Company, setting up a contract dated July 4, 1893, between . . . Crimp, now deceased, the executrix of whose will she is, and the McCormick Construction Company, and therein prayed for annullment of said contract, or, in alternative, a specific performance of the same, and prayed for an injunction and receiver of the assets of the said McCormick Construction Company, that the court thereupon granted a restraining order and appointed a receiver, who took charge of all the assets of the said McCormick Construction Company, except those conveyed by the chattel mortgage hereinafter referred to.

These defendants further answering, say that they are creditors of the said McCormick Construction Company and that the said McCormick Construction Company is indebted to the defendant, Parker, Melcher & Ingraham on a promissory note dated November 14, 1893, for $750, and that the said McCormick Construction Company is indebted to the Moses P. Johnson Machinery Company on a promissory note dated November 14, 1893, for $1,740,
87 That both of these notes are secured by a chattel mortgage, given by said McCormick Construction Company on the 14th day of November, A. D. 1893, and filed for record in the office of the recorder of deeds of Will county in the State of Illinois on the 14th day of November, 1893, at 4:42 o'clock p. m., and duly recorded as document No 176,148, in book 292, page 322, all of which will more fully appear by copies of the said mortgage and two notes filed herewith as exhibits A, B and C, respectively, which are asked to be taken and read as part of this answer, and by the originals of said mortgage and notes, which these defendants are ready and willing to produce and show unto your Honors, by which said mortgage there was conveyed to the defendants herein named, together with the Northwestern National Bank of Chicago, and the Ingersoll-Sergeant Drill Company a large amount of personal property located in said Will county, consisting

Answer of Parker, Melcher & Ingraham.

of various and divers tools, implements, machinery, horses, mules and all the implements and utensils which were then being used by the said McCormick Construction Company in its work under the said contract hereinbefore referred to, in order to secure the payment of the two promissory notes above mentioned, together with two other promissory notes held by the said Northwestern National Bank of Chicago and the Ingersoll-Sergeant Drill Company; that thereafter to wit: on the —— day of ———, A. D. 1893, in default of the payment of the said notes, the mortgagees named in said mortgage, including these defendants, took possession of the said property under said chattel mortgage, and advertised the
88 same for sale. That upon the filing of the original bill herein said sale has been adjourned from time to time in the hope that some disposition might be made of the assets of said McCormick Construction Company, by which all its indebtedness might be liquidated. That the mortgagees under said mortgage have been custodians of said property from the said date of foreclosure and taking possession up to and including this 15th day of January, A. D. 1894, and that the proper care and preservation of the horses and mules and other property included in the said mortgage necessitated considerable outlay and expense, and that said property was preserved and kept in good condition by said mortgagees at a total expense of about $260, that these expenses were advanced by said mortgagees in proportion to the amount of their claims under the mortgage, making respectively the following advances:

The Ingersoll-Sergeant Drill Company.....	$162
Northwestern National Bank.....	54
Moses P. Johnson Machinery Company.....	31
Parker, Melcher & Ingraham.....	13

That the mortgagees under said mortgage procured the personal services of William A. Parker as custodian of the said property, and that these mortgagees believe that said William A. Parker should be compensated for his services as such custodian to the amount of $100, which these mortgagees believe would be a reasonable compensation.

These defendants further answering, say that they retained the possession of said property conveyed by the said chattel mortgage, until this 15th day of January, A. D. 1894, when pursuant to
89 the order of this court entered on January 5, 1894, that said property conveyed by said mortgage be sold for $8,000 with the provision that such sale should not impair any of the rights of

Answer of Parker, Melcher & Ingraham.

said mortgagees under said mortgage, but that said fund should stand in place of said property, these defendants on the day and date aforesaid, turned over the property to the receiver, ... Sexton heretofore appointed herein, to be disposed of in the manner indicated in said order.

These defendants therefore join in the prayer of the said amended and supplementary bills that the liens against said property and their priority be determined, and that the claim of these defendants, together with the claims of the other mortgagees named in the said mortgage, be decreed to be a first and prior lien upon the said property mentioned in and conveyed by the said mortgage. That the $8,000 which may be realized by carrying out the order of the court for the sale of said property be applied to the payment of the debt of these defendants and the other mortgagees mentioned in the said mortgage without impairing their right as general creditors after the said fund of $8,000 shall have been exhausted. That the mortgagees be each allowed out of the general fund realized from the sale of the assets of the said McCormick Construction Company the several amounts hereinbefore enumerated which they have heretofore advanced in the preservation of the said property mentioned and described in the said mortgage, and for such other and further orders touching the subject-matter as the court
90 may deem proper in order to protect the interests of these defendants in said mortgage.

And these defendants deny all and all matters and unlawful combination or confederation wherewith they are charged by said bill, without this, that there is any other matter, cause or thing in complainant's said bill of complaint or amended or supplementary bills contained, material or necessary for these defendants to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of these defendants, all which matters and things these defendants are ready and willing to aver, maintain and prove as this honorable court shall direct, and pray to be hence dismissed with their reasonable costs and charges.

PARKER, MELCHER & INGRAHAM,
MOSES P. JOHNSON MACHINERY COMPANY,
By WEIGLEY, BULKLEY & GRAY,
Their Solicitors.

WEIGLEY, BULKLEY & GRAY,
Solicitors.

99 On the same day, to wit: the nineteenth day of January, 1894, came the Northwestern National Bank by its solicitor and filed in the clerk's office of said court its intervening petition, which said intervening petition is in the words and figures following, to wit:

INTERVENING PETITION.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS, } ss.
NORTHERN DIVISION.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, SITTING IN THE NORTHERN DIVISION OF SAID DISTRICT.

Eugenia Crimp,
Complainant,
vs.
McCormick Construction Company *et al.*
Defendants.

In Chancery,
Gen. No. 23,147.

Intervening Petition of Northwestern Nat'l Bank.

The Intervening petition of the Northwestern National Bank of Chicago, intervening by leave of court, first had and obtained, for and in behalf of its interest in the above entitled cause.

And thereupon said intervenor shows and states to this court:

1st. That this intervenor is a banking corporation, organized and established under the statute of the United States of
100 America known as "The National Bank Act," located and carrying on its business at the city of Chicago, in the Northern District of Illinois, aforesaid, and that it is a citizen of the State of Illinois.

2d. That on or about the fourth day of December, A. D. 1893, Eugenia Crimp, complainant in the above entitled cause, and styled a citizen of the State of Illinois, filed her original bill in said

Intervening Petition of Northwestern Nat'l Bank.

cause for relief against the McCormick Construction Company, a corporation organized and established under the laws of the State of Missouri, as stated in said bill, and R. P. McCormick, both stated in said bill to be citizens of the State of Missouri as defendants, in which cause said proceedings were thereupon afterwards had that, among other things, Patrick J. Sexton was by the consideration and order of this court appointed to be the receiver of this court, in said cause of the property and assets of said McCormick Construction Company, and having qualified in that behalf entered upon the performance of his duties as such receiver; to the several files and records in which cause this intervenor hereby makes reference for further certainty and details in the premises.

3rd. That prior to the filing of said bill, and on or about the fourteenth day of November, A. D., 1893, said McCormick Construction Company being indebted to this intervenor in the sum of three thousand ($3,000) dollars for moneys loaned and advanced to said company by this intervenor, executed and delivered to this intervenor the promissory note of said McCormick Construc-
101 tion Company for said sum, bearing date of the fourteenth day of November, A. D., 1893, payable on demand at Chicago, Illinois, to the order of this intervenor, (in said note described by the abbreviation of "North Western National Bank") and to secure said note also executed and delivered to this intervenor a conveyance, commonly known as a chattel mortgage, of even date with said note conveying and mortgaging to this intervenor the goods, chattels and personal property hereinafter mentioned.

4. That at and prior to the date of said note and chattel mortgage said McCormick Construction Company was carrying on construction or excavation work, under a contract with the Sanitary District of Chicago, in that behalf, upon a section of the line of the drainage canal being constructed by said sanitary district known as section fourteen of said canal, said section being situate in the township of Lockport, in the County of Will, in the State of Illinois, in the northern district of Illinois, aforesaid, and that said goods, chattels and personal property conveyed and mortgaged by said chattel mortgage embraced and comprised all of the plant, machinery tools, horses, mules, stock, material and outfit, belonging to said company and located and in use by it on said section fourteen.

5. That said chattel mortgage also by its terms conveyed and mortgaged the same goods, chattels and personal property afore-

said, not only to this intervenor, but likewise to three other mortgagees named therein as follows, to wit: To the Ingersoll-Sergeant Drill Company (therein described to be a corporation organized and existing under the laws of West Virginia) to secure
102 the sum of nine thousand (9,000) dollars and to the Moses P. Johnson Machinery Company (therein described to be a corporation existing under the laws of the State of Missouri, to secure the sum of seventeen hundred and forty (1,740) dollars, and to Parker, Melcher & Ingraham (therein described to be a corporation existing under and by virtue of the laws of the State of Illinois), to secure the sum of seven hundred and fifty (750) dollars.

6. That said chattel mortgage was, upon and as a part of its said execution and on the fourteenth day of November, A. D. 1893, pursuant to the laws of the State of Illinois, acknowledged before and entered by H. R. Clark, a Justice of the Peace in and for said township of Lockport, in said Will County, in said State of Illinois, and was pursuant to said laws of Illinois, on the same day and year last named filed for record in the office of the recorder of said Will County, and was recorded in said office in book 292 of records on page 322 thereof.

7. That this intervenor in aid of brevity, does not here further enumerate the long list of chattels and personal property mortgaged by said chattel mortgage nor the sundry other details of said instrument, but asks leave of court in that behalf to refer for the same to the original or to a duly certified copy of said chattel mortgage, or will hereafter by leave of court file a schedule thereof by way of supplement hereto, if the court shall deem
103 the same necessary.

(8) That after the said execution, acknowledgment and recording of said chattel mortgage, and before the bringing of the above entitled cause, and on or about the fourteenth day of November, A. D. 1893, this intervenor, together with said other mortgagees named in said chattel mortgages, proceeding by virtue and in exercise of their lawful rights in the premises, took possession of said mortgaged property toward the satisfaction of their respective mortgage debts aforesaid, and advertised said mortgaged property for sale under said chattel mortgage and by their lawful custodians and agents continued to keep and hold such possession henceforth until on or about the fifteenth day of January, A. D. 1894, when they caused such possession to be turned over to said Patrick J. Sexton, receiver as aforesaid, as is hereinafter further set forth.

Intervening Petition of Northwestern Nat'l Bank.

(9) That after the bringing of the above entitled cause it was made to appear to this court on the part of the complainant therein, and of said receiver, that it would be in furtherance of equity in said cause that the outstanding contract aforesaid of said McCormick Construction Company with said Sanitary District of Chicago, together with all the rights of said construction company appurtenant thereto, should be sold and converted into money, by said receiver, under the order of this court, and that a sale of such contract and rights could more advantageously be made by causing to be sold with them at the same time the said mortgaged property,

which mortgaged property, although then in the possession of
104 and subject to, all the rights of said mortgagees as aforesaid,

was nevertheless *in situ* where said contract was to be carried on, and had been at large expense provided and transported to that point, and had been otherwise specially planned, adapted and used for the carrying on said work under said contract so that the value of said contract and contract rights was interwoven with and largely dependent on the ownership and use of said mortgaged property in connection therewith, whereupon and in consideration thereof this court, by its order entered in said cause on or about the fifth day of January, A. D. 1894 among other things ordered said receiver to sell to one Eastman and one Smith said contract and rights for the sum of thirty-three thousand ($33,000) dollars, and also to said Eastman & Smith said mortgaged property, free from all liens, for the further sum of eight thousand (8,000) dollars, to which order said mortgagees, co-operating with this court in that behalf as hereinafter set forth, consented on the footing of the rights and protection reserved to them by said order, which order, among other things, provided that all the rights, liens, and equities of said respective mortgagees should be transferred to and preserved against the fund of eight thousand (8,000) dollars, to be realized by said receiver on such sale the same as the date of such order they existed against said mortgaged property ordered to be sold for that sum, but without prejudice to all equities of said mort-

gagees as general creditors of said McCormick Construction
105 Company after exhausting any their priorities against said

fund of eight thousand (8,000) dollars and with leave of court, given to them in said order, to intervene in said cause on behalf of their respective interests in the premises, to which order of court, and to the other proceedings of record in said cause in and about the matter of said sale, this intervenor asks leave to refer for further certainty and details.

10. That this intervenor is informed and thereupon states,

that said receiver on or about the fifteenth day of January, A. D. 1894, consummated said sale so ordered by this court, on which day said mortgagees surrendered to him in aid thereof their said possession of said mortgaged property; and this intervenor is likewise informed and thereupon states that said purchasers have paid over to said receiver said respective prices of thirty-three thousand (33,000) dollars and eight thousand (8,000) dollars mentioned in and pursuant to said order of this court

11. That said indebtedness and note of said McCormick Construction Company to this intervenor, securing which said chattel mortgage was given as aforesaid, remains (with interest to accrue thereon at the rate of five per centum per annum from and after the twenty-fourth day of January, A. D. 1894) wholly unpaid and unsatisfied.

12. That said mortgagees, from the date of their taking possession of said mortgaged property as aforesaid, on or about the fourteenth day of November, A. D. 1893, and to and until the fifteenth day of January, A. D. 1894, when they turned said prop-
106 erty over to said receiver as aforesaid, were obliged to pay and become liable for sundry necessary costs, charges and expenses for the custody, protection and safe-keeping of said mortgaged property, which property consisted of a large amount of valuable chattels, tools, materials and machinery situated at a desolate locality on the line of said drainage canal, where without such safeguards they were subject to very serious damage, loss and depredations, and which mortgaged property also embraced four horses and twelve mules, requiring constant supplies of food and other attention; that this intervenor on the eighth day of January, A. D. 1894, paid the sum of fifty-four dollars and four cents ($54.04) for its pro rata proportion, as between said mortgagees, of a part of said costs, charges and expenses then brought into account between them, and is informed that there is a further sum of upwards of four hundred (400) dollars for the like costs, charges and expenses remaining to be brought into account and paid; that this intervenor is informed that negotiations are pending with said receiver whereby it is possible that under the order of this court he may assume the payment of said unpaid items of said expenses, which embrace, as this intervenor is informed, liabilities for sundry unconsumed supplies and food for said horses and mules turned over to said receiver at the same time with said mortgaged property.

13. That until further certainty is practicable in the premises

Intervening Petition of Northwestern Nat'l Bank.

this intervenor cannot state what, if any, proportion of said unsettled account for costs, charges and expenses mentioned in the last preceding paragraph will fall on it to pay, and it will therefore
107 pray this court for leave to state its rights, case and interest in that behalf by way of supplement hereto when the same shall be more fully ascertained.

14. That for a number of weeks prior to the filing of said original bill in the above entitled cause, and after said mortgagees took possession of said mortgaged property, the affairs of said McCormick Construction Company, as is disclosed by said bill and by the record and proceedings in said cause, had drifted to wreck and confusion, and the steady custody and guard interposed by said mortgagees over said mortgaged property, and as incidental thereto over said section fourteen of said drainage canal, on which said construction contract had been in course of execution, and over which said property was scattered, were, in fact and by the result, in the nature of a salvage service to all concerned in said company.

15. That after said bill was filed, and in aid of and co-operating with the efforts of this court to sell said contract, together with said mortgaged property as a whole, said mortgagees, through the course of the tedious and successive biddings and proceedings entertained by this court in that behalf, from time to time postponed their said advertised sale of said mortgaged property; and the greater part of said costs, charges and expenses paid out and incurred by said mortgagees in and about the guard, safe-keeping and custody of said mortgaged property and plant was incurred, as this intervenor is informed and so states, during the period of such co-
108 operation of said mortgagees with this court, and during the delay occasioned by said proceedings toward said sale, finally ordered and consummated as above set forth.

16. That this intervenor respectfully insists that all of said costs, charges and expenses so as aforesaid reasonably paid out and incurred by said mortgagees in the premises ought equitably to be brought into account and allowed by this court, with the like preference in right against the assets and funds of the said McCormick Construction Company within the administration of this court, as shall be given by this court to and in respect of the general moneys pending this cause paid out by said receiver for the welfare or protection of the assets of said construction company, and this intervenor charges that said amount toward said expenses so already contributed and paid by it, together with such further amount, if

any, of said unsettled balance of expenses which when ascertained this intervenor as liable therefor shall be required to pay, should be so as aforesaid preferred, allowed and secured to it by the equitable order of this court, with lawful interest thereon if delayed in payment.

17. That after the exhaustion of its lawful priorities in the premises against the price of said mortgaged property paid to said receiver as aforesaid, this intervenor will be and remain with all the rights and equities of a general creditor of said McCormick 109 Construction Company in respect of any proportion of said indebtedness due to this intervenor from said company which shall then still remain unsatisfied.

18. Wherefore, and inasmuch as this intervenor has not otherwise an adequate remedy, it prays this court, the premises considered, to cause such answer to be made to this petition on the part of said receiver and the parties in said cause shall be requisite, and that under due proceedings and orders of this court in that behalf, this court may find for this intervenor upon all of its rights and demands hereinbefore set forth, and may award to it its priorities against and satisfaction thereof out of the several funds aforesaid, under the administration of this court in said cause, and that this court may secure to this intervenor all of its rights against said funds as a general creditor of said McCormick Construction Company after the priorities of this intervenor shall be exhausted, and that this court may grant to it such further order and relief in the premises as equity and the rights and case of this intervenor shall require, with its costs in that behalf.

And this intervenor will ever pray, etc.

CHARLES M. STURGES,
Solr. for the Northwestern National Bank
of Chicago.

Afterwards, to wit: on the twenty-fifth day of January, 1894, came the receiver in said entitled cause and filed in the clerk's office of said court his report, which said report is in the words and figures following, to wit:

111 RECEIVER'S REPORT.

IN THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE NORTHERN DISTRICT OF ILLINOIS.

Eugenia Crimp
vs.
McCormick Construction Company
and R. P. McCormick.

In Chancery.
No 23,174.

Receiver's Report, filed Jan. 25, 1894.

Now comes Patrick J. Sexton, receiver heretofore appointed in the above entitled cause, and respectfully begs leave to report his doings as such receiver under the order heretofore made and entered by this honorable court, on the 5th day of January, 1894.

Said receiver reports that immediately after the entry of the said order he proceeded to negotiate with the Sanitary District of Chicago concerning the transfer of the rights under its contract with the McCormick Construction Company in his former report more fully described, and upon the 16th day of January, 1894, the formal transfer thereof was effected, and that Smith and Eastman assumed the duties under said contract and had transferred to them all the rights of the McCormick Construction Company, as in said order of January 5th, directed, and there was also transferred
112 to the said Ezekiel Smith and Joseph Eastman the personal property (except five mules) transferred by the mortgage by the said McCormick Construction Company to the Inger soll-Sergeant Drill Company and others, said property being more fully described in the report heretofore made by your receiver.

That said property (except five miles) was transferred to the said Ezekiel Smith and Joseph Eastman on the 16th day of January, 1894, after having been delivered up to your receiver by the custodian thereof.

That thereupon the said Ezekiel Smith and Joseph Eastman paid to your receiver the sum of forty-one thousand dollars ($41,000.00) for and because of the transfers above referred to, which said sum is now in the possession of your receiver, less certain necessary expenses paid for attorney's fees.

PATRICK J. SEXTON.

Subscribed and sworn to before me, this 18th day of January, A. D. 1894.

SAMUEL T. JACOBS,
Notary Public.

[SEAL.]

[Endorsed]: Filed Jan. 25, 1894.

S. W. BURNHAM,
Clerk.

118 Afterwards, to wit: on the eighth day of February, 1894, came McNeil, Higgins Company by its solictors and filed in the clerk's office of said court its intervening petition, which said intervening petition is in the words and figures following, to wit:

INTERVENING PETITION OF MCNEIL, HIGGINS CO.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } ss.

IN THE CIRCUIT COURT OF THE NORTHERN DIVISION.

Eugenia Crimp,
Executrix,
vs.
McCormick Construction Company.

To the Honorable Judges of said Court:

Your petitioner, McNeil, Higgins Company, in t
119 Chicago, County of Cook and State of Illinois, i
shows unto the court that on the 4th day of Decem
1893, Eugenia Crimp, the executrix herein, filed her b
plaint herein against the defendant and R. P. McCormick, setting up a contract, dated the 24th day of July, A. D. 1893, between Crimp, deceased, the executrix of whose will she is, and the McCormic Construction Company, and therein prayed for an annullment of the said contract, or an alternative, a specific performance of the same, and prayed for an injunction and that a receiver be appointed to take charge of the goods and chattels and effects of the said McCormick Construction Company, for full particulars of which said bill is hereby referred to.

Your petitioner further shows that it is a creditor of the said McCormick Construction Company for goods and merchandise sold and delivered by your petitioner to the said McCormick Construction Company, for the purpose of carrying on the prosecution of the work upon the drainage canal mentioned in the said bill.

Your petitioner further shows that on the 22nd day of December, 1893, in the Circuit court in and for the State of Illinois, and County of Cook, in a certain cause wherein your petitioners are plaintiffs and the McCormick Construction Company defendants, that a judgment was on the day aforesaid, to wit: on the 22nd day of December, 1893, rendered in favor of the plaintiff against the McCormick Construction Company for the sum of one thou-
120 sand and three dollars ($1,003.47) and forty-seven cents, general number 123,343, term number 22,481, which said judgment is in full force and effect.

Your petitioner further shows that on the 18th day of November, 1893, your petitioner filed a suit of attachment against the said McCormick Construction Company, which said writ of attachment and judgment hereinbefore mentioned your petitioner begs leave to refer to and be made a part of this petition, upon an account for the sum of one thousand and three dollars ($1,003.47) and forty-seven cents, which was and is due your petitioner, and filed his attachment bond in the said cause, that therefore an attachment writ was issued out of said court, directed to the sheriff in and for the county of Cook and State of Illinois, commanding him to levy on so much of the estate, real and personal, of the said McCormick Construction Company to be found in his county, as shall be of sufficient value to satisfy the said debt and costs, according to the complaint, that therefore the said sheriff in and for the county of Cook and State of Illinois, on the 17th day of November, 1893, levied said writ upon all the rights, titles and interests of the said McCormick Construction Company, in and to the following described personal property, to wit:

124 Your petitioner shows by means of said levy that he is entitled to a lien upon the said property, and is entitled to have said claim paid out of the estate of the said McCormick Construction Company.

Your petitioner further shows that one R. P. McCormick is the owner of the majority of the stock of the said McCormick Construction Company, that he has had charge and control of

Intervening Petition of McNeil, Higgins Co

125 the same, and that he in utter disregard of the rights of this petitioner and other creditors of the said corporation has set about to wreck the said corporation and appropriate to his own use the money and property belonging to the same, that the principal estate of the said corporation consists of a contract set out of in original petition herein, between the McCormick Construction Company and the trustees of the Sanitary District of Chicago, that on account of the said R. P. McCormick and McCormick Construction Company's failure to carry out the said contract according to its terms, the same is about to be forfeited and determined by the trustees of the said Sanitary District, particulars of which contract, and also the fraudulent practices of the said McCormick Construction Company through the said R. P. McCormick, as against the rights of the creditors of the said McCormick Construction Company are set out of the said bill herein, which said particulars are reiterated herein and made a part hereof as fully as though set out in haec verba.

Your petitioner therefore prays to be made a party defendant to said bill and asks leave to intervene therein and states that a receiver has been appointed and states that an injunction as prayed for in the said bill has been granted, and prays that this court will find the amount due from the said McCormick Construction Company to said petitioner, declare the same a lien upon the property levied upon under the said attachment writ, declare that your
126 petitioner is entitled to be paid the same out of said property and out of any and all property in the hands of the said receiver, and that such other and further relief in the premises as to your honors will seem meet and to equity will pertain.

Your petitioner therefore prays that the McCormick Construction Company, R. P. McCormick, Eugenia Crimp, executrix, may be required to answer this petition, within a short day to be fixed by this honorable court, and your petitioner will ever pray.

DUNCOMBE, DUNCOMBE & NEWTON,
Solicitors for Petitioner.

132 Afterwards, to wit: on the tenth day of February, 1894, came the complainant in said entitled cause by her solicitor, and filed in the clerk's office of said court her answer to the intervening petition of the Northwestern National Bank, which said answer is in the words and figures following, to wit:

Answer to Petition of Northwestern National Bank.

Circuit Court of the United States of America,
Northern District of Illinois,
Northern Division. } ss.

Eugenia Crimp, Executrix, etc.,
Complainant,
vs.
McCormick Construction Company and R. P. McCormick,
Defendants.
} *In Equity, Term No. 667. Gen. No. 23,174.*

Answer to Intervening Petition of Northwestern Nat'l Bank, filed Feb. 10, '94.

The answer of Eugenia Crimp, defendant to the intervening petition of the Northwestern National Bank of Chicago.

And now comes Eugenia Crimp, executrix, and complainant in the original bill, and saving unto herself all benefits of exception or otherwise which can be taken to said intervening petition and for answer to said petition says:

1. She admits the allegations of paragraphs one and two of said intervening petition, but as to the exact sum which the McCormick Construction Company was indebted to the intervenor upon the 14th day of February, 1893, she had neither information or knowledge, and she therefore asks that said intervenor be required to make strict proof of the same and as to whether or
133 not said company executed its promissory note, and executed and conveyed a valid chattel mortgage upon said date she has neither information or knowledge sufficient to form a belief, and therefore asks for strict proof.

2. She admits a certain purported mortgage was executed upon said date to this intervenor, the Ingersoll-Sergeant Drill Company, the Moses P. Johnson Machinery Company and to Parker, Melcher & Ingraham which pretended to convey the goods, chattels and plant described in said intervening petition, but as to the manner of its execution and the validity of its consideration and whether or not the sums therein mentioned were due and of the amounts therein claimed she has neither information or knowledge sufficient to form a belief.

Answer to Intervening Petition of Northwestern Nat'l Bank, filed Feb. 10, '94.

3. And for further answer she admits that this intervenor together with the other mortgagees named in said pretended chattel mortgage did take possession of the property described in said instrument and retain possession thereof until on or about the fifteenth day of January, 1894, when said property was turned over to the receiver appointed herein, she further admits that the rights of the McCormick Construction Company under its contract with the Sanitary District of Chicago, was sold to Smith & Eastman for thirty-three thousand dollars ($33,000) and the plant and property described in said pretended mortgage were sold to Smith & Eastman for the sum of eight thousand dollars ($8,000) according to the order of this court. And as to the proceedings and orders under which said sales were consummated she refers to the files and records of this court.

134 As to what amount remains due and unsatisfied, if any sum remains due and unsatisfied, according to the tenor of said note she has neither knowledge nor information sufficient to form a belief.

As to the costs and expenses paid out by the intervenor herein and the other persons named in said pretended mortgage she respectfully asks that the intervenor be put to strict proof regarding the same, for the reason that she has neither sufficient knowledge nor information to form a belief in regard thereto. But this defendant says that if any costs, charges and expenses were incurred in the foreclosure of said pretended mortgage that they constitute no claim against the receiver herein or the fund now in court unless it first shall be established that said pretended mortgages were valid and legally executed for proper consideration and the debts thereby secured were valid, subsisting obligations of the McCormick Construction Company, and of these things this defendant has neither information or knowledge sufficient to form a belief and therefore denies the same. And the defendant further says in reference to said costs, charges and expenses that the same should in no event be paid out of the general fund of the estate of the McCormick Construction Company, but should he relegated solely for their payment to the fund arising from the sale of the property described in said pretended mortgages.

And the defendant herein further answering says that said McCormick Construction Company, a corporation organized under the laws the State of Missouri, entered into a contract with
135 the Sanitary District of Chicago, on the 12th day of July, 1892,

Answer to Intervening Petition of Northwestern Nat'l Bank, filed Feb. 10, '94.

which contract was for the purposes described and had the covenants and condition set forth in the original bill filed herein, that one R. P. McCormick was the president of said company and after having made certain representations and pretentions to W. G. Crimp, whose executrix this defendant now is, induced said Crimp to advance certain moneys to be used for certain purposes in the manner and under the conditions and after the proceedings fully detailed in the original bill filed herein, to which for the sake of reference and for fuller recital this defendant begs leave to refer. And this defendant says that it was agreed by and between the said Wm. G. Crimp, and the said R. P. McCormick, that no funds belonging to the said McCormick Construction Company should be drawn from the bank in which they were deposited save upon checks signed by the said R. P. McCormick, and countersigned by the said W. G. Crimp; that the funds belonging to said corporation were kept on deposit with the intervenor herein, which was doing a general banking business in the City of Chicago, County of Cook and State of Illinois. That this agreement concerning the manner in which checks should be drawn, and funds paid out, upon such checks, was duly communicated to the intervenor herein, the Northwestern National Bank of Chicago, and acquiesed in by said bank, that the said Wm. G. Crimp was, by reason of illness, incapacitated from taking part in the management of said company for some
136 months before his death and during said illness it was arranged between the said R. P. McCormick, Wm. G. Crimp and the Northwestern National Bank of Chicago, where the said McCormick Construction Company, made all its deposits and which said bank kept the account of said McCormick Construction Company, that one John Reilly should countersign the checks of the McCormick Construction Company in place and instead of the said W. G. Crimp, and this intervenor was never authorized to pay out any sum upon any checks unless said sum was duly anthorized to be paid by a check which had been signed by the said R. P. McCormick and which had been countersigned by the said John Reilly.

The defendant states that a few days before the death of Wm. G. Crimp, there was on deposit with this intervening bank the sum of about seven thousand four hundred dollars ($7,400) to the credit of the said McCormick Construction Company, and that a few days before the death of the said Wm. G. Crimp, to wit: on the 11th day of November, 1893, said McCormick drew a check for seventy-four dollars ($74.00) and got the said Reilly to countersign it. That afterwards without the knowledge of the said Reilly the said McCormick fraudulently altered said check so as to read and call

Answer to Intervening Petition of Northwestern Nat'l Bank. filed Feb. 10, '94.

for seventy-four hundred dollars ($7,400) and took it to the said bank and then and there presented it for payment.

This defendant says that the said bank without any right or authority so to do and notwithstanding that the check as presented had never been countersigned by any one paid over to the said McCormick the said sum of seventy-four hundred dollars
137 ($7,400). This defendant says that the said R. P. McCormicks at the time of the presentation of the said check was in straightened and failing circumstances. That the said W. G. Crimp was confined to his bed with a serious and what proved to be a fatal illness, that it appeared from the face of said check itself that the same was not, when presented the same as it had originally been written, and this defendant charges that this intervening bank was grossly negligent in paying out the sum of seventy-four hundred dollars ($7,400) upon said check without making inquiry and investigation concerning its validity.

The defendant further charges that she is informed and believes and so charges the fact to be that the said R. P. McCormick has concealed the money so paid him upon said check and that so far as this defendant is able to discover said McCormick is now utterly and hopelessly insolvent.

Wherefore she says that the action of the said bank in paying out said sum of seventy-four hundred dollars ($7,400) upon said check negligently and without proper authority so to do has damaged the estate of the McCormick Construction Company in a sum equal to the difference between any balance which might be owing from the said McCormick Construction Company to the said bank and the said sum of seventy-four hundred dollars ($7,400) and the said McCormick Construction Company should not in equity be bound to pay the same, nor should its receiver, out of the funds in his possession, be required to pay the claim of the said North-
138 western National Bank of Chicago.

Wherefore she asks that this intervention of the Northwestern National Bank of Chicago be dismissed. And this defendant will ever pray, etc:

A. S. BRADLEY,
Solicitor for Eugenia Crimp.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

Answer to Intervening Petition of Northwestern Nat'l Bank, filed Feb. 10, '94.

Eugenia Crimp, being duly sworn makes oath and says that she has read the above answer subscribed by her and knows the contents thereof and that the same is true of her own knowledge except as to matters which are therein stated to be on her information and belief and as to those matters she believes them to be true.

EUGENIA CRIMP.

Subscribed and sworn to before me this 10th day of February, A. D. 1894.

SAMUEL T. JACOBS,
[SEAL.] *Notary Public.*

[Endorsed]: Filed February 10, 1894.
S. W. BURNHAM,
Clerk.

155 Afterwards to wit: on the twenty-fifth day of May, 1894, came the Northwestern National Bank of Chicago and filed in the clerk's office of said court its replication to the answer of Eugenia Crimp to its intervening petition, which said replication is in the words and figures following, to wit:

REPLICATION.

UNITED STATES OF AMERICA
NORTHERN DISTRICT OF ILLINOIS, } ss.
NORTHERN DIVISION.

In the Circuit Court of the United States for the Northern District of Illinois sitting in the Northern division of said district.

Eugenia Crimp,
vs.
McCormick Construction Company, *et al.* } *Chancery*
Gen. No. 23,174.

The replication of the Northwestern National Bank of Chicago intervening petitioner in said cause to the answer of Eugenia Crimp, to its intervening petition filed in said cause.

Replication, filed May 25, '94.

This repliant saving and reserving to itself now and at all times hereafter, all and all manner of benefit and and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer of the said respondent for replication thereunto says that it will aver, maintain and prove its said intervening
156 petition to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said respondent is uncertain, untrue and insufficient to be replied unto by this repliant without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied is true. All which matters and things this repliant is ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by its said intervening petition it has already prayed.

THE NORTHWESTERN NATIONAL BANK OF CHICAGO,
By CHARLES M. STURGES,
Its Solicitor.

[Endorsed]: Filed May 25, 1894.
S. W. BURNHAM,
Clerk.

Afterwards, to-wit, on the thirteenth day of March, 1894, came
149 the Repano Chemical Co., by its solicitors, and filed in the clerk's office of said court its answer to the amended and supplemental bill of complaint of complainant, which said answer is in the words and figures following, to-wit:

ANSWER.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } ss.

IN THE CIRCUIT COURT OF THE NORTHERN DIVISION.

Eugenia Crimp, Executrix,
vs.
McCormick Construction Co. *et al.*

Answer of Repauno Chemical Co., filed Mch. 13, '95.

The answer of Repauno Chemical Company, one of the defendants, to the amended and supplemental bill of complaint of Eugenia Crimp, executrix.

This defendant saving and reserving unto itself any and all manner of benefit and advantage that can or may be had or taken to said bill for the many errors and uncertainties therein, for anwser thereunto says:

That it is a creditor of said McCormick Construction Company for goods and merchandise sold and delivered by this defendant to the said McCormick Construction Company for the purpose of carrying on and the prosecution of the work upon the drainage canal mentioned in said bill, on account of which said sales it has filed
with the Master in Chancery herein with its proofs of claim
150 under the order of reference in this cause, and it hereby makes the same a part of this answer, and it further says that a part of its said claim is set out in the schedule filed with the contract, filed as an exhibit with the original bill of complaint herein.

Your petitioner further shows that on the 15th day of No-

Answer of Repauno Chemical Co., filed Mch. 13, '95.

vember, A. D. 1893, your petitioner filed its said suit in attachment against said McCormick Construction Company upon said account for the sum of $3,321.00, which was due upon said account, that it filed its attachment bond in said cause, that thereupon an attachment writ issued out of this court to the marshal of said district commanding him to levy on so much of the estate, real and personal, of the said McCormick Construction Company to be found in his district as should be sufficient value to satisfy said debts and costs according to the complaint.

That thereafter, Frank Hitchcock, the said marshal, on the 16th day of November, 1893, levied said writ upon all the rights, title and interest of the said company in and to the following described personal property, to-wit: A lot of dredging machines and other property lately in the possession of the said company in Will County, Illinois, but then in the custody not only of the sheriff of said Will County, but also a mortgage of said property, and made said levy subject to former levies, which said writ and return thereon being one of the files of this court, is made a part hereof, and reference is hereby made to a copy of the same attached to the intervening petition of this defendant, filed in this cause. This
151 defendant shows that by means of said levy it is entitled to a lien upon, and is entitled to have said claim paid out of the estate of said McCormick Construction Company.

This defendant further answering denies that said McCormick Construction Company executed said contract alleged in said bill to have been executed by said company and R. P. McCormick on the one hand and William G. Crimp on the other, and denies that said company ever authorized or ratified the execution of said contract, and says that if said contract was ever executed at all it was executed as an individual and personal contract between Wm. G. Crimp and R. P. McCormick. And the defendant says that said Crimp never paid said company and said company never received the said sums of money or any part of the same. And further says that the said W. G. Crimp never advanced to the said McCormick Construction Company one cent for the purpose of carrying on the said contract, which is set out in the said bill of complaint between the said Sanitary District of Chicago and the said R. P. McCormick or McCormick Construction Co.

And this defendant further answering says that it does not admit nor deny that the said W. G. Crimp ever advanced to the said R. P. McCormick any sum or sums of money whatever, but calls for strict proof of the same.

Answer of Repauno Chemical Co., filed Mch. 13, '95.

And this defendant further says that, whatever transactions took place, or agreement was entered into between said W. G. Crimp in his life time and the said R. P. McCormick was an
152 individual contract or agreement entered into by and between the said R. P. McCormick and the said W. G. Crimp and the same had no relation whatever to the said McCormick Construction Company, and that the moneys alleged in the bill of complaint to have been advanced by the said W. G. Crimp to the said R. P. McCormick were advanced, if advanced at all, to the said R. P. McCormick, and in no consideration thereof, the said R. P. McCormick assigned, transferred and set over to the said W. G. Crimp stock of the said McCormick Construction Company which he held as his own individual property, in consideration for and of the amount of money which the said W. G. Crimp is alleged in the said bill of complaint to have paid to the said R. P. McCormick, and in consideration thereof this defendant alleges and states the fact to be, as per the contract, which is made part of the complainant's bill of complaint, that the said R. P. McCormick and the said W. G. Crimp were to become co-partners of all profits which the said McCormick would be entitled to under and by virtue of the contract which the said McCormick Construction Company made with the said Chicago Sanitary District.

This defendant further answering says that there never was an agreement entered into between the McCormick Construction Company and the said W. G. Crimp whereby the said W. G. Crimp was to advance any sum of money whatever for the purpose of carrying out the said contract with the said Chicago Sanitary District, and as to the allegations in reference thereto in the complainant's bill of complaint, the said defendant puts the said complainant on strict proof thereof.

This defendant further states that the said complainant has no
153 claim whatever to be entitled to any of the assets of the said McCormick Construction Company, save and except what would belong to her as the representative of the said W. G. Crimp, after all liabilities of the said McCormick Construction Company had been paid that the only interest said Crimp had in his life time and the only interest his personal representative have or has is as partner of stockholder of said McCormick Construction Company.

This defendant further answering says that, if it is true as alleged in said bill that the said contract provided that in case of failure of the first party to carry out and faithfully perform all the

Answer of Repauno Chemical Co., filed Mch. 13, '94

agreements and undertakings under said agreements, that the said ninety-nine shares of stock of said construction company mentioned in paragraph 5th of said agreement, should immediately upon such failure become the property of said second party as and for liquidated damages under said agreement. Then said complainant is only entitled to said 99 shares of stock and to no claim against the corporation except as a stockholder to the extent of said 99 shares of stock.

This defendant further answering, says, that said complainant is not entitled to any relief against said corporation, except as a partner of the same in carrying out the drainage contract, or except as a stockholder in the corporation.

This defendant denies that said complainant has any lien upon said contract with the trustees of said sanitary district for any moneys advanced or alleged to have been advanced by said William G. Crimp.

Now, this defendant having answered said bill prays the same
154 advantage of this, its answer as if it had demurred to the same and prays to be hence dismissed.

THORNTON & CHANCELLOR,
Solicitors for deft, Repauno Chem. Co.

[Endorsed]: Filed March 13, 1895.

S. W. BURNHAM,
Clerk.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS.

IN THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE NORTHERN DISTRICT OF ILLINOIS.

Eugenia Crimp,
Executrix,
vs.
McCormick Construction Company, *et al.*
} *664—23,174.*

Answer of Complt. to Petition of Consolidated Coal Co., filed May 26, 1894.

158 Comes now the defendant, Eugenia Crimp, by her solicitor, and saving to herself all benefits of exception or otherwise, which can be taken to the intervening petition herein filed, and to its imperfections, without waiving any or either of them, or to take advantage of the same, answering said petition of the Consolidated Coal Company of St. Louis a corporation says: That she admits said petitioner is a creditor of the McCormick Construction Company, but as to whether or not an attachment was levied by the petitioner upon the property and goods of the McCormick Construction Company, she has neither information nor belief, and neither affirms or denies the same, she admits that the contract between the said McCormick Construction Company and the Board of Trustees of the Sanitary District of Chicago was in danger of being forfeited at the time said intervening petition was filed, but as to the amount which is due to the said petitioner
159 she has neither knowledge nor information sufficient to form a belief and therefore asks strict proof to be made concerning the same, but the complainant says that by reason of the matters and things in her original bill of complaint filed herein and her contract therein referred to, her rights are superior and prior to the rights of the general creditors of said estate, and that she is entitled to a prior lien upon the proceedings of the contract in said bill of complaint referred to made and entered into by and between the McCormick Construction Company, W. G. Crimp, and R. P. McCormick.

S. A. LYNDE,
Solicitor for Eugenia M. Crimp.

[Endorsed]: Filed May 26, 1894.

S. W. BURNHAM,
Clerk.

On the same day, to wit: the twenty-sixth day of May, 1894, came the complainant in said entitled cause by her solicitor, and filed in the clerk's office of said court her answer to the intervening petition of McNeil, Higgins and Company, which said answer to said petition is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. }

160 IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

Eugenia Crimp, *Executrix*,
vs.
McCormick Construction Company *et al.* } *664-23, 174.*

Answer of Complt. to Petition of McNeil, Higgins Co., filed May 26, '94.

Comes now the defendant, Eugenia Crimp, by her solicitor, and saving to herself all benefits of exception or otherwise, which can be taken to the intervening petition herein filed, and to its imperfections without waiving any or either of them, or to take advantage of the same, answering said petition of McNeil, Higgins Company, a corporation, says:

That she admits said petitioner is a creditor of the McCormick Construction Company, but as to whether or not an attachment was levied by the petitioner upon the property and goods of the McCormick Construction Company, she has neither information nor belief, and neither affirms or denies the same, she admits that the contract between the said McCormick Construction Company and the board of trustees of the Sanitary District of Chicago was in danger of being forfeited at the time said intervening petition was filed, but as to the amount which is due to the said petitioner she has neither knowledge or belief sufficient to form a belief
161 and therefore asks strict proof to be made concerning the same, but complainant says that by reason of the matters and things in her original bill of complaint filed herein and her contract therein referred to, her rights are superior and prior to the rights of the general creditors of said estate, and that she is entitled to a prior lien upon the proceeds of the contract in said bill of complaint referred to, made and entered into by and between the McCormick Construction Company, W. G. Crimp and R. P. McCormick.

S. A. LYNDE,
Solicitor for Eugenia M. Crimp.

[Endorsed]: Filed May 26, 1894.
S. W. BURNHAM, Clerk.

On the same day, to wit: the second day of June, 1894, came Parker, Melcher and Ingraham, by their solicitors, and filed in the clerk's office of said court its intervening petition, which said petition is in the words and figures following, to wit:

162 PETITION OF PARKER, MELCHER & INGRAHAM.

UNITED STATES OF AMERICA, }
NORTHERN DISTRICT OF ILLINOIS, } ss.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DIVISION OF THE NORTHERN DISTRICT OF ILLINOIS. IN CHANCERY.

Eugenia Crimp }
vs.
McCormick Construction Company *et al.* }

Intervening Petition of Melcher, Parker & Ingraham.

And now comes Parker, Melcher & Ingraham, a corporation, by leave of court first had and obtained, and files this its intervening petition for and on behalf of its interest in the above entitled cause.

And thereupon petitioner shows and states to this court that it is a corporation organized and doing business under and by virtue of the laws of the State of Illinois, and carrying on its business in the city of Chicago, in the State of Illinois, and that it is a
163 citizen of the State of Illinois, and the Northern District thereof.

That on or about December 4, 1893, Eugenia Crimp, a citizen of the State of Illinois, filed her original bill in the above entitled cause for relief against the McCormick Construction Company, a corporation organized and established under the laws of Missouri, and R. P. McCormick, as stated in said bill, citizens of the State of Missouri, as defendants, and that afterwards one Patrick J. Sexton was, by the consideration and order of this court, appointed the receiver of the property and assets of the defendant, the McCormick Construction Compay, and having qualified in that behalf, entered upon the duties of said receiver, as will more fully and at large appear from the records and files of the court.

Intervening Petition of Melcher, Parker & Ingraham.

That prior to the filing of said bill, and on or about the 14th day of November, 1893, the said McCormick Construction Company, being indebted to your petitioner in the sum of $750, for money loaned and advanced to said company by your petitioner, executed and delivered to your petitioner the promissory note of said McCormick Construction Company for said sum, bearing date the 14th day of November, 1893, and payable on demand at Chicago, Illinois, to the order of this petitioner, and to secure said note also executed and delivered to your petitioner a conveyance commonly known as a chattel mortgage, of even date with said note, conveying and mortgaging to your petitioner the goods and chattels and personal property in said mortgage mentioned, a copy of which said note and mortgage are hereto attached and marked "Exhibit A and B."

That at and prior to the date of making said note and chattel
164 mortgage, the said McCormick Construction Company was carrying on construction and excavation work, under a contract with the Sanitary District of Chicago, Illinois, in that behalf, upon a section of the drainage canal being constructed by the said Sanitary District, known as Section 14 of said canal, said section being situated in the township of Lockport, in the County of Will and State of Illinois, in the Northern Division of the Northern District of Illinois aforesaid, and that said goods, chattels and personal property conveyed and mortgaged by said chattel mortgage embraced all the plant, machinery, tools, horses, mules, stock, material and outfit belonging to said company and located and used upon said Section 14, and specifically and particularly described in said chattel mortgage, as will appear by reference thereto, that the said chattel mortgage by its terms conveyed and mortgaged said chattels and personal property therein described not only to your petitioner, but likewise to the Ingersoll-Sergeant Drill Company, a corporation therein described, being organized and existing under and by virtue of the laws of the State of West Virginia, to secure the sum of $9,000 to the Moses P. Johnson Machinery Company, as therein described, a corporation existing under and by virtue of the laws of the State of Missouri, to secure the sum of $1 740, and to the Northwestern National Bank of Chicago, Illinois, a corporation of the United States, to secure the sum of $3,000. That said chattel mortgage was duly executed by the said McCormick Construction Company on the 14th day of November, 1893, and duly acknowledged and entered by H. R. Clark, a justice of the peace in and
165 for the township of Lockport in the said Will County, in said State of Illinois, on the same date, and was duly filed for rec-

Intervening Petition of Melcher, Parker & Ingraham.

ord in the recorder's office of Will County on the 14th day of November, 1893, at the hour of 4:42 in the afternoon, in book 292, at page 322, as document No. 176,148; all of which was done in pursuance of the laws of the State of Illinois in regard to chattel mortgages.

That after the execution, acknowledgment and recording of said chattel mortgage, and on, to wit: the 14th day of November, 1893, this petitioner, together with the other mortgagees therein named, proceeding by virtue of the said chattel mortgage and in the exercise of their rights in the premises, took possession of said mortgaged property towards the satisfaction of their respective mortgage debts, and advertised the said mortgaged property for sale, under the terms of said mortgage, and continued to hold possession thenceforth, and until on or about the fifteenth day of January, 1894, when they caused such possession to be turned over to Patrick J. Sexton, receiver as aforesaid, as hereinafter set forth.

That after the bringing of the above entitled cause, it was made to appear to this court on the part of complainant therein and of the said receiver, that it would be in furtherance of equity in said cause that the outstanding contract aforesaid of said McCormick Construction Company with the Sanitary District of Illinois, together with all the rights of said construction company appurtenant thereto, should be sold and converted into money by said receiver, under the order of this court and that a sale of such contract and rights could be more advantageously made by causing to be sold with them at the same time the said mortgaged property which said mortgaged property, although in the possession of and subject to all the rights of said mortgagees as aforesaid, was nevertheless in the place where said contract was to be carried on and had been at a large expense provided and transported to that point, and had been otherwise specially planned, adapted and used for the carrying on of said work under said contract so that the value of said contract and contract rights was interwoven with and largely dependent on the ownership and use of the said mortgaged property in connection therewith. Whereupon, and in consideration thereof, this court, by its order, entered in the above entitled cause, on or about the 5th day of January, 1894, ordered said receiver to sell to Eastman & Smith said contract and the rights thereunder, for the sum of $33,000 and also to the same parties the said mortgaged property, free from all liens, for the sum of $8,000. To which order your petitioner and the other mortgagees co-operating with this court in that behalf consented on

the basis of their rights and protection being preseved to them by said order, which order, among other things, provided that all the rights, liens and equities of said respective mortgages should be transferred to and preserved against the fund of $8,000 to be realized by said receiver on such sale the same as at the date of such order they existed against said mortgaged property ordered to be sold for that sum, but without prejudice to the other equities of said mortgages as general creditors of said McCormick Construction Company after exhausting any of their priorities against said fund of $8,000 and with leave of court given to them in said order to intervene in said cause in behalf of their respective interests
167 in the premises. To which order of court and to other proceedings of record in this cause, and in and about the matter of said sale, this intervenor asks leave to refer for greater certainty and detail.

Your petitioner is informed and therefore states that said receiver did, on or about the 15th day of January, 1894, complete said sale, as ordered by this court, upon which date your petitioner, together with the other mortgagees named in said mortgage, rendered their possession of said mortgaged property to him in aid thereof. And your petitioner is likewise informed and therefore states that said purchasers have paid to said receiver the said sums of $33,000 and $8,000 mentioned in and pursuant to the order of this court.

That the said note securing said indebtedness of the McCormick Construction Company to your petitioner, which said chattel mortgage was given to secure, remains wholly unpaid and unsatisfied, together with the interest thereon at the rate of 5% per annum from November 14, 1893.

That the said mortgagees, from the date of their having possession of said mortgaged premises as aforesaid, on or about November 14, 1893, until the 15th day of January, 1894, when they turned said property over to said receiver as aforesaid, were obliged to pay and become liable for sundry necessary costs, charges and expenses, for the protection, custody and safe-keeping of said mortgaged property, which property consisted of a large amount of valuable chattels, tools, material, machinery; also
168 4 horses and 12 mules, situated upon the line of said drainage canal, in a locality where without proper protection and safeguards they were subject to serious damage and loss, and said live stock required constant care, food and attention.

Intervening Petition of Melcher, Parker & Ingraham.

That your petitioner on the ..... day of ..... paid the sum of $ ..... for its pro rata proportion, as between said mortgages of the costs and expenses then brought into account between them, and it is further informed that there is a further sum of upwards of some $400 or $500 for like costs, charges and expenses, remaining to be brought into account and to be paid, and that some negotiations have been pending by which the receiver may assume and pay said account, and until said matter is fully adjusted your petitioner is unable to state the exact amount for which it is liable for such expenses, costs and disbursements, but asks that when the same is fully ascertained that the same may be allowed.

Your petitioner further states that for a number of weeks prior to the filing of said bill of complaint in the above cause, and after the said mortgagees took possession of the said mortgaged property, the affairs of the McCormick Construction Company, as is disclosed by said bill and by the records and proceedings of said cause, had drifted into wreck and confusion, and it was necessary to keep continual care and custody by said mortgagees over said mortgaged property, and, as incidental thereto, over Section 14 of said drainage canal, on which said construction contract had been in course of execution and over which said property was scattered,

which were in fact and by the result in the nature of a salvage 169 service to all concerned in said company.

Your petitioner would further show that after the bill was filed in aid of and co-operating with the effort of this court, to sell said contract, together with said property as a whole your petitioner and the other mortgagees in said mortgage named, through the course of the successive biddings and proceedings entertained by this court in that behalf, from time to time postponed their advertised sale of said mortgaged property, and that the greater part of said costs, charges and expenses paid out and incurred by the said mortgagees, in and about the safe-keeping and custody of said mortgaged property and plant was incurred, as your petitioner is informed, and so states, during the period of such co-operation of the mortgagees in said mortgage named, with this court, and during the delay occasioned by said proceedings towards said sale, ordered and consummated as above set forth.

Your petitioner respectively states that said costs and charges and expenses, so reasonably paid out and incurred by your petitioner and the remaining mortgagees in said mortgages named in the premises, ought equitably to be brought into account and al-

lowed by this court, as a preference against the assets and funds of the said McCormick Construction Company, and that any sums paid by your petitioner and the other mortgagees in said mortgages mentioned, or which your petitioner and the other mortgages are now liable for, should be allowed and paid, as against the assets and property of said McCormick Construction Company as an expense in caring for said property.

170 Your petitioner therefore asks that after the exhaustion of its lawful priorities in the premises as aforesaid, this intervenor will be and remain with all the rights and equities of a general creditor of said McCormick Construction Company in respect to any portion of said indebtedness due to your petitioner from said company which shall then still remain unsatisfied.

Wherefore, as your petitioner has not an adequate remedy, and all property and assets are now in possession of this court, through its receiver, it prays this court to require an answer to be made to this petition on the part of said receiver and the said complainants and defendants to said cause, as shall be requisite, and that this court may find for this petitioner upon its rights and demands hereinbefore set forth and may award to it its priorities, against and in satisfaction thereof out of the several funds aforesaid under the administration of this cause, and that this court may secure to this petitioner all its rights against said fund as a general creditor of said McCormick Construction Company, aft ties of your petitioner shall be exhausted and that th grant to it such further and other relief in the premis and good conscience shall require together with its behalf. And your petitioner will ever pray.

PARKER, MELCHER & INGRAHAM,
By William A. Parker, Prest. and Treasurer.

178 On the same day, to wit: the eighth day of June, 1894, came the Ingersoll-Sergeant Drill Company by its solicitors and by leave of court first had and obtained filed in the clerk's office of said court its answer to the original and amended and supplementary blll, nunc pro tunc as of May 25, 1894, which said answer is in the words and figures following to wit :

ANSWER OF INGERSOLL-SERGEANT DRILL COMPANY.

UNITED STATES OF AMERICA, }
NORTHERN DISTRICT OF ILLINOIS. }

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS IN CHANCERY.

Eugenia Crimp, Executrix. etc., }
v. } *Genl. No. 23,174.*
McCormick Construction Company and } *Term No. 664.*
R. P. McCormick. }

179 The answer of the Ingersoll-Sergeant Drill Company, a corporation organized and existing under the laws of the State of West Virginia, defendant, to the original and amended and supplementary bill of Eugenia Crimp, executrix, etc., heretofore filed herein.

This defendant now and at all times hereafter saving and reserving unto itself all benefit or advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in said bills contained, for answer thereunto, or to so much and such parts thereof as this defendant *are* advised it is material or necessary for them to answer, answering says :

This defendant admits that on December 4, 1893, Eugenia Crimp, executrix filed her bill in this court against the McCormick Construction Company and the Ingersoll-Sergeant Drill Company, setting up a contract dated July 4, 1893, between William G. Crimp, now deceased, the executrix of whose will she is, and the

McCormick Construction Company, and therein prayed for annullment of said contract or in alternative, a specific performance of the same, and prayed for an injunction and receiver of the assets of the said McCormick Construction Company, that the court thereupon granted a restraining order and appointed a receiver, who took charge of all the assets of the said McCormick Construction Company, except those conveyed by the chattel mortgages hereinafter specifically set forth.

The defendant further answering says, that it is a creditor of the said McCormick Construction Company, and that the said McCormick Construction Company was indebted to said defendant on the 20th day of July, 1893, for supplies and material furnished said
Construction Company, that upon said date, and in order to
180 secure the payment of said indebtedness, the said McCormick
Construction made and delivered to said Ingersoll-Sergeant Drill Company a chattel mortgage, upon the machinery, fixtures and personalty of the said McCormick Construction Company, so far as the said personalty included supplies, machinery and personalty purchased from said Ingersoll-Sergeant Drill Company by said McCormick Construction Company, that said chattel mortgage was filed for record in the office of the recorder of deeds of Will county in the State of Illinois, on the 13th day of November, 1893, at 3:37 o'clock p. m. and duly recorded as document No. 176, 128 in book No. 292, page No. 318. That said chattel mortgage recited, that there was $8,500 indebtedness due said Ingersoll-Sergeant Drill Company from said McCormick Construction Company, all of which will more fully appear by copy of said mortgage filed herewith as Exhibit "D," which is asked to be taken and read as part of this answer, and by the original of said mortgage, which this defendant is ready and willing to produce and show unto your honor, and for full description of machinery and personalty therein contained, reference thereto is hereby had. That said chattel mortgage is a first lien and mortgage upon the property therein contained, but that permission was granted to said McCormick Construction Company to include such personalty in their second mortgage to the other security creditors as set forth fully in this answer, but expressly subject to the lien of said first mortgage.

That defendant further answering says, that it is a creditor of the said McCormick Construction Company and that the said McCormick Construction Company is indebted to the defendant Ingersoll-Sergeant Drill Company on four promissory notes dated
November 14, 1893, that said notes are secured by a chattel
181 mortgage given by said McCormick Construction Company

on the 14th day of November A. D. 1893, and filed for record in the office of the recorder of deeds of Will County, in the State of Illinois, on the 14th day of November A. D. 1893, at 4:42 o'clock P. M. and duly recorded as Document No. 176,148 in book 292, page 322, all of which will more fully appear by copies of the said mortgage and notes filed herewith as Exhibit A and B, respectively, which are asked to be taken and read as part of this answer, and by the originals of said mortgage and note, which this defendant is ready and willing to produce and show unto your honors; by which said mortgage there was conveyed to the defendants herein named, expressly subject to the lien of defendants first mortgage therein recited, together with the Northwestern National Bank of Chicago, and the Moses P. Johnson Machinery Company and Parker, Melcher & Ingraham Company a large amount of personal property, consisting of various and divers tools, implements, machinery, horses, mules and all the implements and utensils which were then being used by the said McCormick Construction Company in its work under the said contract hereinfore referred to in order to secure the payment of the four promissory notes above mentioned, together with other promissory notes held by the said Northwestern National Bank of Chicago, and the Moses P. Johnson Machinery Company and Parker, Melcher & Ingraham Company. That thereafter, to wit: On the.....day of.....A. D. 1893, in default of the payment of the said notes, the mortgages named in said mortgage, including this defendant, took possession of the said property under said chattel mortgage, and advertised the same for sale. That upon the filing of the original bill herein said sale has been adjourned from time to time in the hope that some disposition might be made of
182 the assets of said McCormick Construction Company, by which all its indebtedness might be liquidated. That the mortgagees under said mortgage have been custodians of said property from the said date of foreclosure and taking possession up to and including this 15th day of January A. D. 1894, and that the proper care and preservation of the horses and mules and other property included in the said mortgage necessitated considerable outlay and expense, and that said property was preserved and kept in good condition by said mortgagees at a total expense of about $260. That these expenses were advanced by said mortgagees in proportion to the amount of their claims under the mortgage, making respectively the following advanced:

The Ingersoll-Sergeant Drill Company.....	$162
Northwestern National Bank.....	54
Moses P. Johnson Machinery Company.....	31
Parker, Melcher & Ingraham.....	13

That the mortgagees under said mortgage procured the personal services of William A. Parker, as custodian of the said property, and that these mortgagees believe that said William A. Parker should be compensated for his services as such custodian to the amount of $100, which these mortgagees believe would be a reasonable compensation.

This defendant further answering says that they retained the possession of said property, conveyed by the said chattel mortgage until the 15th day of January, A. D. 1894, when, pursuant to the order of this court entered on January 5, 1894, that said property conveyed by said mortgage be sold for $8,000, with the provision that such sale should not impair any of the rights of said mortgagees under said mortgage, but that such fund should stand in place of said property, this defendant on the day and date aforesaid turned over the property to the receiver, Patrick J. Sexton,
183 heretofore appointed, herein to be disposed of in the manner indicated in said order.

This defendant therefore joins in the prayer of the said amended and supplementary bills that the liens against said property and their priority be determined and that the claim of this defendant, together with the claims of the other mortgagees named in the said mortgage, be decreed to be first and prior lien upon the said property mentioned in and conveyed by the said mortgage, subject to the lien of said first mortgage herein referred to. That the $8,000 which may be realized by carrying out the order of the court for the sale of said property, be applied to the payment of the debt of this defendant and the other mortgagees mentioned in the said mortgage, subject to the payment and lien of said first mortgage without impairing its rights as a general creditor after the said fund of $8,000 shall have been exhausted, that the mortgagees be each allowed out of the general fund realized from the sale of the assets of the said McCormick Construction Company the several amounts hereinbefore enumerated, which they have heretofore advanced in the preservation of the said property mentioned and described in the said mortgage, and for such other and further orders touching the subject matter as the court may deem proper, in order to protect the interests of these defendants in said mortgage.

And this defendant denies all and all matters and unlawful combination or confederation wherewith it is charged by said bill, without this that there is any other matter, cause or thing in complainant's said bill of complaint or amended or supplementary bills con-

tained, material or necessary, for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowl-
184 edge or belief of this defendant, all which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable court shall direct and pray to be hence dismissed with its reasonable costs and charges.

THE INGERSOLL-SERGEANT DRILL COMPANY.
By WM. J. ENGLISH,
Its Solicitor.

196 Afterwards, to wit, on the twelfth day of June, 1894, came the complainant in said entitled cause, by her solicitor, and filed in the clerk's office of said court her answer to the intervening petition of Parker, Melcher & Ingraham, which said answer is in the words and figures following to wit:

ANSWER.

IN THE CIRCUIT COURT OF THE UNITED STATES OF AMERICA, NORTHEN DISTRICT OE ILLINOIS, NORTHERN DIVISION.

Eugenia Crimp, Executrix, etc.,	
197 *Complainant.*	In Equity.
vs.	Term No. 664.
McCormick Construction Company and R. P. McCormick,	Gen. No. 23,174.
Defendants.	

The answer of Eugenia Crimp, Executrix, etc., to the intervening petition of Parker, Melcher & Ingraham.

And now comes Eugenia Crimp, executrix and complainant in the original bill filed herein, and saving unto herself all benefits of exceptions or otherwise which can be taken to said intervening petion, and for answer thereto, or to so much thereof as she is advised is material or necessary to be answered, says:

She admits that said petitionor is a creditor of the McCormick Construction Company, but as to the exact amount of said indebtedness on the 14th day of Nov., 1892, she has neither information or knowledge sufficient to form a belief, and therefore asks that said intervenor be required to make strict proof of the same, ane as to whether or not said company executed its promissory notd and executed a valid chattel mortgage upon said date to secure the

Answer of Complt. to Petition of Parker, Melcher & Ingraham.

same, she has neither information or knowledge sufficient to form a belief, and therefore asks that said intervenor make strict proof.

2nd: She admits that purported note was executed by the McCormick Construction Company to intervenor, and a purported chattel mortgage to secure the same and notes of other parties was executed to the parties named in said petition of intervention, but whether or not the same were valid obligations of said McCormick Construction Company, and whether or not said note to intervenor remains unpaid she has no knowledge or information sufficient to form a belief.

3rd: She admits that the grantees in said chattel mortgage
198 took possession of said personal property, and afterwards turned the same over to the receiver herein, and that the same was sold under order of this court for $8,000.00, and that the contract with the drainage board referred to in the petition of intervention herein was sold by the receiver for $33,000.00, but as to whether intervenor incurred costs in keeping and caring for said personal property and as to the amount of such expenses, if any, this defendant has neither knowledge or information sufficient to form a belief.

And she denies that said intervenor is entitled to any preference in the assets of said McCormick Construction Company for any costs and expenses so incurred, if any were incurred. And the defendant herein further answering says, that by reason of the matters and things alleged in her original bill of complaint filed herein, which said bill of complaint she hereby refers to and prays that the same may be taken as a part of this answer, the said McCormick Construction Company is indebted to her in the sum of exceeding $29,000.00 and that she has a lien to secure the same upon the contract therein referred to between the McCormick Construction Company and the Sanitary District of Chicago, and the proceeds of the sale thereof, which lien she avers is prior and superior to any and all claims and rights of the intervenor herein, or the general creditors of said McCormick Construction Company.

199 Wherefore she prays that the petition of intervention of Parker, Melchor & Ingraham filed herein may be dismissed. And this defendant will ever pray.

EUGENIA CRIMP,
Executrix.
By R. N. BAYLIES,
Solicitor.
R. N. BAYLIES,
Solicitor for Eugenia Crimp.

On the same day to-wit, the sixteenth day of June, came Crane Company *et al.*, by their solicitors and by leave of court first had and obtained, filed in the clerk's office of said court its petition, which said petition is in the words and figures following, to-wit:

PETITION OF CRANE COMPANY.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS.

IN THE CIRCUIT COURT OF SAID DISTRICT IN CHANCERY.

Eugenia Crimp, Executrix of the last will and testament of William G. Crimp, deceased,

vs.

McCormick Construction Company and R. P. McCormick.

664 23,174.

To the Honorable Peter S. Grosscup, Judge of said Court:

Petition of Crane Co., filed June 16, 1894.

201 Your petitioners, Crane Company, Gutta Percha and Rubber Manufacturing Company, Scully Steel and Iron Company, W. B. Crane and Company, Bell and Lee Coal Company, Howe Brown and Company, Kelley, Maus and Company, Simmons Hardware Company, Crerar, Adams and Company, C. M. Henderson and Company, Franklin McVeagh and Company, Equitable Trust Company, S. D. Kimbark, Sherman S. Jewett, A. W. Harris Oil Company, Hibbard, Spencer, Bartlett and Company, Charles S. Seever, Consolidated Coal Company of St. Louis, William Adam, The Barrett Hardware Company of Joliet, Illinois, State Penitentiary, Sawyer Goodman Company, Swift and Company, and Haggie Brothers respectfully show unto your Honor that heretofore, to-wit: on the fourth day of December, A. D. 1893, Eugenie Crimp, executrix of the last will and testament of William G. Crimp, deceased, filed her bill of complaint herein against the said McCormick Construction Company, a corporation, etc., and R. P. McCormick praying therein for the annullment of specific performances on the part of the said defendants of a certain alleged contract therein set forth, dated July 24, 1893, purporting to have been made and executed by the said William G. Crimp, now

Petition of Crane Co., filed June 16, 1894.

deceased, on the one hand, and the said McCormick Construction Company and R. P. McCormick on the other hand, and said bill prays further that a receiver be appointed to take charge of the assets and affairs of the said McCormick Construction Company.

Your petitioners further show that a short time thereafter one Patrick J. Sexton was, by the consideration and order of the court, duly appointed receiver of the property and affairs of said
202 McCormick Construction Company, and that he thereupon qualified as such receiver and entered into the possession and control of the property and affairs of said company.

Your petitioners further show that shortly thereafter it was ordered by the court that the machinery, tools and appliances belonging to said McCormick Construction Company, situated at the works of said company in or near the Town of Lockport, County of Will and State of Illinois, be sold and converted into money, and also that the interest of the said defendants in and to a certain contract under seal then existing between the said defendants and the Sanitary District of Chicago, regarding the excavation and construction of a certain section of the Main Drainage Channel, so called, situated in the Valley of the DesPlaines river be sold and converted into money, and thereupon the said receiver, under the order and direction of the court, sold and conveyed the interest of said defendants in the said machinery, tools and appliances for the sum of $8,000, and the interest of said defendants in the said contract for the sum of $33,000.

Your petitioners further show that they are creditors of the said McCormick Construction Company and thus interested in the disposition of the fund aforesaid, now in the said receiver's hands, that they duly filed their respective claims, pursuant to an order of court, with E. B. Sherman, Esq., the master in chancery of this honorable court, and the same have been proved and allowed by said master, with the exception of the claim of the said Consolidated Coal Company, which was duly filed, all of which and the matters and things hereinbefore stated will more fully appear from the records and files in the above entitled cause, reference to which
203 is hereby made.

Your petitioners further show and state upon information and belief, that the said complainant, Eugenia Crimp, insists that she is entitled to a first lien upon the sale of the aforesaid contract between the said Sanitary District of Chicago and the said McCor-

Petition of Crane Co., filed June 16, 1894.

mick Construction Company, and the Ingersoll-Sergeant Drill Company, Moses P. Johnson Machinery Company, Northwestern National Bank and Parker, Melcher and Ingraham claim a lien upon the proceeds of the sale of the machinery, tools and appliances of said McCormick Construction Company, by virtue of a certain chattel mortgage given by said McCormick Construction Company, it is claimed, to them as mortgagees, dated November 14th, 1893, and that said Ingersoll-Sergeant Drill Company also claim a further lien on said proceeds by virtue of a chattel mortgage given by said McCormick Construction Company, it is claimed, to it as mortgagee, dated July 20th, 1893. Concerning the said lien claimed by the said Eugenia Crimp upon the proceeds of the sale of the said contract with the said Sanitary District, your petitioners say that the said complainant is not entitled to the said first lien upon the said proceeds, nor is she entitled to the payment of her alleged claim out of the said proceeds unto your petitioners respective claims proven before the said master, have been paid. Concerning the liens upon the proceeds of the sale of the tools, ma-
204 chinery and appliances of the said McCormick Construction Company, claimed by the said Ingersoll-Sergeant Drill Company, Moses P. Johnson Machinery Company, Northwestern National Bank, and Parker, Melcher and Ingraham, your petitioners deny, upon information and belief, that the said mortgages were ever executed by the said McCormick Construction Company, and your petitioners affirm that the said complainants are not entitled to priority in the payment of their respective claims, over the claims of your petitioners.

Your petitioners further state, upon information and belief, that the said defendants, the McCormick Construction Company and R. P. McCormick, have abandoned this suit, and that unless your petitioners, or other creditors of said McCormick Construction Company, are permitted to appear and defend the said suit that their rights and the rights of the other creditors of said McCormick Construction Company will be unduly prejudiced.

Your petitioners therefore pray that Eugenia Crimp, executrix of the last will and testament of William G. Crimp, deceased, Patrick J. Sexton, receiver of the McCormick Construction Company, R. P. McCormick, Ingersoll Sergeant Drill Company, Moses P. Johnson Machinery Company, Northwestern National Bank and Parker, Melcher & Ingraham may be required to fully answer this petition, but not under oath, the answer under oath being hereby expressly waived, and that your petitioners may be made parties

Petition of Crane Co., filed June 16, 1894.

defendant to the above entitled cause, and that under due proceedings and orders of this court, in this behalf, the court may find and affirm your petitioners in all their rights and demands hereinbefore set forth, and that the court will order and direct the payment of your petitioners' respective claims out of the funds now in
205 the hands of the said receiver, as first and valid claims against said fund, and that the court will grant such other and further relief in the premises as equity shall require, and to your Honor may seem meet.

And your petitioner will ever pray, etc.

COLLINS, GOODRICH, DARROW & VINCENT,
A. B. STRATTON & TENNEY, CHURCH & COFFEEN,
Solrs. and of Counsel for Petnrs.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

M. Lester Coffeen, being duly sworn, says that he is the agent of the petitioners in this behalf, that he has read the foregoing petitions and knows the contents thereof, and that the statements therein contained are true, except where they are stated to be made upon information and belief, and that the said statements so stated to be made upon information and belief, this deponent believes them to be true.

M. LESTER COFFEEN.

Subscribed and sworn to before me this 15th day of June, 1894.

CHARLES H. WELLS,
Notary Public,
[SEAL.] Cook County, Illinois.

(Endorsed.) Filed June 16, 1894.

S. W. BURNHAM,
Clerk.

Afterwards, to wit: on the twenty-sixth day of June, 1894, came Eugenia Crimp and filed in the clerk's office of said court her answer to the petition of Crane Company *et al.*, which said answer is in the words and figures following, to wit:

206 ANSWER.

IN THE CIRCUIT COURT OF THE UNITED STATES OF AMERICA, NORTHERN DISTRICT OF ILLINOIS.

Eugenia Crimp, *Plaintiff,*
vs.
The McCormick Construction Company, *Defendant.*

Answer of Complt. to Petition of Crane Co., filed June 26, 1894.

Answer of Eugenia Crimp, plaintiff, to the petitions of intervention of Crane Co., Gutta Percha & Rubber Co., W. B. Crane Co., Bell & Lea Coal Co., Howe, Brown & Co., Kelley, Maus & Co., C. M. Henderson & Co., Franklin McVeagh & Co., Equitable Trust Co., S. D. Kimbark, Sherman S. Jewett, A. W. Harris Oil Co., Hibbard, Spencer, Bartlett & Co., Chas. S. Seever, Consolidated Coal Company of St. Louis, William Adam, The Barrett Hardware Company of Joliet, Illinois, State Penitentiary, Sawyer Goodman Co., Swift & Co. and Haggie Brothers.

Eugenia Crimp, now and at all times saving to herself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections of said petition of intervention, for answer thereto, or to so much thereof as this defendant to said petition is advised it is material or necessary to be answered, answering says:

She admits that she is the plaintiff in the said suit against the McCormick Construction Company, and that a receiver for said McCormick Construction Company has been appointed by this court, and that the property as alleged has been sold, and that the said receiver has the proceeds of said sale in his hands, and
207 that said funds amount to at least $33,000.00.

She admits that the alleged claim of the Consolidated Coal Company of St. Louis has not been allowed by the receiver.

She further answering, says that as to whether all or any of the intervenors are creditors of the said defendant, the McCormick

Answer of Complt. to Petition of Crane Co., filed June 26, 1894.

Construction Company, or whether each or any of them has filed, or filed and had claims against said construction company allowed by the receiver as alleged that she has neither knowledge or information sufficient to form a belief, and asks that strict proof thereof be required.

And further answering, she says that she admits that she insists and asserts that she is entitled to a first lien upon all moneys in the hands of said receiver, and refers to her said petition heretofore filed herein touching her said claims and demands against the McCormick Construction Company, and prays that the same may be considered and taken as part of this answer, and she hereby reasserts the allegations therein contained.

She says that as to whether the said McCormick Construction Company has abandoned the suit as alleged she has neither knowledge or information sufficient to form a belief.

And having fully answered, she prays as in her original petition, and prays that her said claims and demands against the McCormick Construction Company be declared a first and prior lien upon the funds in the hands of the receiver, and that the claims
208 of said creditors, if any, may be decreed inferior to her said claim against said company. And she will ever pray.

EUGENIA CRIMP,
By R. N. BAYLIES,
Her Solr.

R. N. BAYLIES,
Solicitor.

[Endorsed]: Filed June 26, 1894.

S. W. BURNHAM,
Clerk.

217 Afterwards, to wit: on the tenth day of July, in the July term of said court, 1894, in the record of proceedings thereof in said entitled cause, before the Hon. Peter S. Grosscup, District Judge, appears the following entry, to wit:

Eugenia Crimp
vs.
McCormick Construction Company.
} *In Chancery, 23,174.*

ord Entry.

It is ordered by the court that the issues framed by the pleadings relating to Crimp's claim be referred to William M. Booth, one of the masters of this court, to investigate and report with his findings thereon within twenty days.

218 Afterwards, to wit: on the twenty-first day of July, 1894, came William M. Booth, Master in Chancery, and filed in the clerk's office of said court his report, which said report is in the words and figures following, to wit:

MASTER'S REPORT.

IN THE CIRCUIT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION.

Eugenia Crimp, *Executrix, etc.*,
vs.
The McCormick Construction Company, and R. P. McCormick.
} *Bill Gen. No. 23,174.*
Term No. 664.

To the Honorable Peter S. Grosscup, Judge of said Court:

Report of Wm. M. Booth, Master in Chancery, filed July 24, 1894.

The undersigned, one of the masters in chancery of said court to whom by order entered July 10th, 1894, the issues framed by the pleadings in above cause relating to the Crimp claim were referred to investigate and report with his findings within twenty days, respectively reports as follows:

That it appearing from the pleadings that the question whether or not the said claim should be allowed at all was in the inception purely a matter of law, the master notified the solicitor for said

complainant and the solicitor of the receiver and all parties who had entered objections to the allowance of said claim to appear before him and present oral and written arguments in support of their respective positions.

Said hearing was begun on Monday, July 16th, 1894, at 11
219 o'clock A. M., at which time the following solicitors were present, R. N. Baylies, Esq., representing the complainant, Eugenia Crimp, executrix of the will of W. G. Crimp deceased; Mr. W. J. English, representing the Ingersoll-Sergeant Drill Company; Mr. F. S. Weigley, representing M. P. Johnson Machinery Company and others; Messrs. W. A. Vincent and A. B. Cross, representing the Consolidated Coal Company and others; Messrs. Tenney, Church & Coffeen, representing Franklin MacVeagh & Company and others; Mr. Charles M. Sturges, representing the Northwestern National Bank; Mr. A. Burton Stratton, representing Hibbard, Spencer, Bartlett & Company; Mr. Arnot Stubblefield of Thornton & Chancellor, representing Repauno Chemical Company; Mr. D. T. Duncombe, representing McNeil & Higgins.

Such hearing continued all of said day and was adjourned until 10 o'clock A. M. of the succeeding day, and was concluded at 12 o'clock noon of Tuesday, July 17th, 1894. In the course of such hearing arguments were made by Mr. R. N. Baylies in behalf of said claimant, and by Messrs. W. E. Church, Chas. M. Sturges, F. S. Weigley, W. A. Vincent, W. J. English, D. T. Duncombe and Arnott Stubblefield in opposition to the allowance of said Crimp claim.

The solicitor for said claimant stated that he based his clients' claim upon a certain written contract which was entered into on the 24th day of July, 1893, by and between the McCormick Construction Company and R. P. McCormick individually, parties of the first part, and W. G. Crimp (complainant's testator), party
220 of the second part. The said contract purported to be attached to the original bill in said cause as exhibit A, but it does not in fact so appear, nor elsewhere in the files, the master deems it proper to make said contract a part of his report. The following was agreed by all parties to be a substantially correct copy of said contract.

"Whereas, The McCormick Construction Company, a corporation organized and existing under the laws of the State of Missouri, is the owner of a certain contract for excavating 6,000 lineal

Report of Wm. M. Booth, Master in Chancery, filed July 21, 1894.

feet, known as Section No. fourteen (14) *of the* of the Main Drainage Channel of the Chicago Drainage Ditch, said contract having been entered into between the said McCormick Construction Company and Sanitary District of Chicago, under date of July 12, 1892. And by the terms of said contract it is provided that the said McCormick Construction Company shall excavate on said main drainage channel about 1,000,000 yards of solid rock at and for the price of seventy-three (73) cents per yard, about 210,000 yards of glacial drift at and for the price of twenty (20) cents per yard, and erect and build about 19,946 yards of rock wall at and for the price of two (2) dollars per yard, for other and more specific details of which said work and the terms of said contract reference is had to the same; and

Whereas, said McCormick Construction Company has now, in pursuance of said contract, erected on said Section No. fourteen (14) a large amount of machinery, engines, boilers, inclines, cables, tracks, sidings, cars, buildings, etc., and is engaged in excavating and building said Main Drainage Channel, under the superintendence and direction of its president and general manager, R. P. McCormick, and

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Whereas, said R. P. McCormick is the owner of 225 shares of the capital stock of said McCormick Construction Company and

Whereas, W. G. Crimp, of 4445 Champlain Avenue, Chicago, is desirous of becoming interested in the said McCormick Construction Company on the terms, conditions and stipulations as hereinafter provided.

Now it is agreed between said McCormick Construction Company and R. P. McCormick, individually, hereafter called the party of the first part, and W. G. Crimp, hereafter called the party of the second part, as follows, to-wit:

First: That in consideration of the sum of twenty-five thousand, two hundred dollars ($25,200) cash, paid to said McCormick Construction Company by said second party, there shall be at once assigned and issued to said second party one hundred and twenty-six (116) shares of the capital stock of the said McCormick Construction Company, now owned by R. P. McCormick, the par value thereof being two hundred dollars ($200) per share, full paid and non-assessable.

Report of Wm. M. Booth, Master in Chancery, filed July 21, 1894.

Second. That said second party shall be at once elected a director and vice-president of said company, and shall enter and personally assist in operating and managing said company, and
222 its business and affairs without salary, and may furnish a suitable representative in the office of said company as assistant in its management, and at the expense of said company as he may elect, such expense not to exceed the sum of one hundred dollars per month.

Third. That the personal expenses or outlays of the officers of said Construction Company shall be charged to such officers personally. The officers of said company shall receive no salaries, but the said K. P. McCormick shall devote his entire time to and manage and personally direct the construction of said drainage channel, during the life of said contract, without charge other than the share of profit that shall accrue to him hereunder and as a shareholder in said construction company.

Fourth. That said second party shall be entitled to fifty per cent. of the net profit accruing to, and to be derived by said construction company on account of said work now being done or to be done under its said contract with said sanitary district and the first party hereto hereby agrees and guarantees that the amount of such profit to become due and payable to said second party shall not be less than twenty-five thousand dollars ($25,000) not including the sum of twenty-five thousand, two hundred dollars ($25,200) invested in the stock of said company under this agreement which said latter sum shall be returned to said second party prior to and before any division and distribution of the profits arising to said construction company, under said construction agreement,
223 shall be made, on receipt by said second party of which share of the profit and the money advanced and to be advanced by said second party, second party shall reconvey to said McCormick two hundred and twenty-five (225) shares of the capital stock of said construction company herein mentioned.

Fifth. That as security for the guaranty of said twenty-five thousand dollars ($25,000) profit, in addition to the principal sum of twenty-five thousand two hundred dollars ($25,200) paid by said second party to said Construction Company under this agreement, there shall be delivered and assigned to said second party ninety-nine shares of the stock of said Construction Company of the par value of nineteen thousand eight hundred ($19,800) owned by the said R. P. McCormick, which shall be held as collat-

Report of Wm. M. Booth, Master in Chancery, filed July 21, 1894.

eral to this undertaking and as security for the guaranty of profits herein made by the first party.

Sixth. That there shall also be delivered, but not assigned, to said second party the original contract existing between said Construction Company and the Sanitary District of Chicago, to be held by said second party in connection with the stock of said Construction Company hereby agreed to be transferred and issued to said Crimp for the guaranty herein made, and as security for any sums or sum other than above mentioned, that he may advance to said Construction Company, it being intended that said Crimp through his ownership and control of all said stock hereby provided to be transferred to him, shall control the said contract in the
224 event of failure by first party to carry out this contract or breach of this contract by the first party, and it is further agreed that said contract shall not, nor shall any right, title or interest therein be at any time assigned by any of the persons signing this contract. The said contract always to remain the property of said Construction Company subject to the rights of said second party hereunder.

Seventh. That the said sum of twenty-five thousand two hundred dollars ($25,200) to be now advanced by said second party, shall be used by the first party in the payment and liquidation of the debts and liabilities of the McCormick Construction Company, as set out in the sworn schedule of assets and liabilities hereto attached and made a part hereof except as hereto otherwise provided.

Eighth. That said second party shall advance to said Construction Company the further sum of seven thousand dollars ($7,000) to pay the item of that amount set out in the schedule to become due the Northwestern National Bank. That when said indebtedness is paid by said second party, there shall be delivered to him seven promissory notes, executed by said Construction Company, each for the sum of one thousand dollars (1,000) and payable at intervals of forty (40) days from the date of the advance of the said sum of seven thousand dollars ($7000) by said second party, the said notes to bear interest at the rate of seven (7) per cent. per annum from date.

Ninth. That the ninety-nine (99) shares of stock in said Construction Company to be assigned to said second party
225 under paragraph fifth hereof and said contract mentioned in paragraph six hereof, shall also stand and be held by said

second party in like manner as security for the payment of the promissory notes of said Construction Company covering the advance of the seven thousand dollars (7,000) aforesaid.

Tenth. That in case of the failure of the first party to carry out and faithfully perform all the agreements and undertakings hereunder, that the said ninety-nine (99) shares of stock of said construction company mentioned in paragraph fifth hereof, immediately upon such failure become the property of said second party as and for liquidated damages hereunder.

Eleventh. That on the completion of the work provided for in said contract and the receipt of said construction company of payment for the same, and in case of the faithful performance of this agreement and of all the undertakings hereunder by the first party hereto, and the payment to said second party of the sum of twenty-five thousand two hundred dollars ($25,200), the amount originally advanced hereunder and of the additional sum of one-half the profits, but not less than twenty-five thousand dollars ($25,000), as provided in said guaranty, and of the said sum of seven thousand dollars ($7,000) and interest as herein provided, then there shall be re-assigned and returned to said R. P. McCormick all of
226 the shares of said stock of said construction company, hereinbefore provided to be issued to said second party and held by said second party in his own name or held by him as collateral, and said contract shall in such case be returned to said company and thereupon this contract shall be ended.

Twelfth. That at the completion, termination and fulfillment of this agreement in all its terms and conditions, all the shares of stock above mentioned, either held by said second party in his own name or as security for said guaranty, shall be transferred to said McCormick, but all of the increment and betterment of the assets of said company and all additions thereto made subsequent to the date of this agreement shall be the joint and equal property of the parties hereto, to be disposed of as they may agree.

This contract is signed in duplicate by the parties hereto this 24th day of July, A. D. 1893.

McCormick Construction Company.
By R. P. McCormick, Pres.
R. P. McCormick,
W. G. Crimp.

ASSETS AND LIABILITIES McCORMICK CONSTRUCTION COMPANY.

227 JULY 20, 1893.

ASSETS.

Report of Wm. M. Booth, Master in Chancery, filed July 21, 1894.

North Western Nat'l Bank	$ 720.00
Reservation on Contract	5,250.00
Inventory on Property	54,058.00
New Machinery & Plant	11,000.00
Buildings	4,000.00
Inclines	1,500.00
Cable Sowers & Fittings	3,000.00
Construction	5,000.00
Contract, Cost & Expense	9,000.00
Commissary Stock	1,500.00
Camp Outfit for Building	2,000.00
Cars, Track, etc	2,000.00
Miscellaneous Fittings for Machinery with Steam Hose, etc	1,000.00
Total Assets	$70,028.00

ASSETS AND LIABILITIES.

228 LIABILITIES.

Bills due July 1, 1893.	
Parker, Melcher & Ingraham	$ 8,500.00
Repauno Chemical Co.	2,950.00
Miscellaneous Bills	1,820.00
Bills for July, etc	
Account Dynamite not Rendered	500.00
Rails Ordered, Not Received	474.00
Miscellaneous Bills	904.00
Bills Payable Outstanding	
Northwestern Nat'l Bank, due Aug. 10	7,000.00
Ryan and McGurney	2,000.00
Am. Forcite Pow Mfg. Co., Sept. 19	1,703.00
Sept. 19.	
M. P. Johnson Mchy Co., Oct. 2	1,730.00
Thos. P. Conrad, Sept. 16	150.00
Thos. Ostler, Oct. 1	225.00
Total Liabilities	$27,956.00

Total Assets	$70,028.00.
Total Liabilities	27,956.00.
Net Assets	$42,072.00.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

Report of Wm. M. Booth, Master in Chancery, filed July 21, 1894.

229 I, R. P. McCormick of the McCormick Construction Company, being first duly sworn, on oath state that the above written statement of assets and liabilities of the McCormick Construction Company includes all of the assets and liabilities of the said company up to and including the date of July 20th, 1893, as the same appears on the books of said company, and that the said list includes all of the liabilities of said company at the date aforesaid.

R. P. McCORMICK,
President.

Subscribed and sworn to before me this 24th day of July, A. D. 1893.

JOHN S. HUMMER,
[SEAL.] Notary Public.

There being nothing expressed in the foregoing and attached contract, dated July 24th, 1893, and signed by R. P. McCormick and W. G. Crimp, expressing clearly from what date accounts pertaining to the business covered by said contract shall commence and continue other than as set forth in the statement of assets and liabilities made a part of said contract, we hereby mutually agree on this tenth day of August, 1893, that the party of the first part pay all labor accounts to and including July 20th, 1893, and receive credit for the proportion of the estimate for July to and includ-
230 ing July 20, 1893, less the reservation of 12½ per cent., which reservation is named as a part of the assets in the foregoing contract as signed by R. P. McCormick and W. G. Crimp and dated July 24, 1893, as above described.

R. P. McCORMICK. (Seal.)
W. G. CRIMP. (Seal.)

The position taken by counsel for the complainant was that the said contract was a legal and valid one, and that the complainant, as the legal representative of said W. G. Crimp, occupied toward the said McCormick Construction Company the position of a creditor, that said contract provided for a loan of money by said Crimp to said construction company, the repayment of which,

Report of Wm. M. Booth, Master in Chancery, filed July 21, 1894.

with fifty per cent. of the net profits, was secured by a pledge of the 225 shares of stock and the original contract with the sanitary district, that said Crimp was not, and never intended to be, a stockholder in said construction company, that he was not and never intended to be a partner of said construction company and said R. P. McCormick or either of them, and never held himself out to be such, that, in short, under and by virtue of said contract he was simply a pledgee of the stock and contract named, with the right to have his claim for advances made under said contract satisfied in full out of the fund arising from said pledged property, before other creditors could have any right to share in such fund.

231 As the larger part of the fund in the receiver's hands herein proceeds from the sale of said drainage contract, this question of priority is a highly important one.

Complainant's counsel further claimed for his client, if such priority were refused, the right to at least share *pari passu* with the general creditors in the fund resulting from the sale of such drainage contract and other assets of said company.

It was admitted that said Crimp was elected a director and vice-president of said construction company, and that he did enter and personally assist, for a time at least, in operating and managing said company and its business and affairs as provided in the second clause of said contract.

It was also admitted that the drainage contract referred to in the foregoing contract, contained a provision which prohibited the original contractor from assigning it or sub-letting the work under penalty of forfeiture.

It was neither admitted nor denied, by counsel for the objecting creditors, that said Crimp had paid the sum claimed, or any sums under the said contract, but that question was left open for future determination if it should become material.

It was admitted that the sum of $7,000 named in the eighth clause of said contract was not advanced by said Crimp, but it was claimed on behalf of complainant that the contract was a divisible one, and that the guaranty applied to whatever sums had been actually advanced under the preceding clauses of said contract. As it
232 was admitted that there were no net profits, counsel for complainant made no claim on the guaranty that Crimp's share of

net profits should be not less than $25,000, and claims only the amounts actually advanced by said Crimp.

On behalf of the objecting creditors three different, and to some extent conflicting, interpretations and constructions were placed upon said contract:

1st. That said contract was utterly illegal, null and void, and incapable of enforcement in a court of equity, on the following grounds: First, that clause second was in law corrupt, as being in effect a bargain and sale of an elective office in a corporation; and, second, that it was an act *ultra vires* for a corporation to guarantee to any person, either a stockholder or otherwise, any given amount of profits; or, at least, if any such contract could be made, it could only be with the concurrence of all stockholders.

2d. That said contract constituted in effect a copartnership for a single adventure, and that Crimp, having been a copartner, his legal representative could not be allowed to compete, as a creditor of the firm, with its other creditors.

3d. That said contract and the acts and doings of the parties thereunder constituted said Crimp a mere stockholder in the McCormick Construction Company, and that, whatever the rights of the parties to the contract might be, *inter se*, as to creditors of said corporation, he had no right to any claim against its assets un-
233 til all creditors of the corporation had been paid in full.

It was further claimed that said contract did not constitute a pledge to said Crimp of the drainage contract, but was merely intended to secure him in the sense of preventing either of the other parties to said contract from assigning or otherwise forfeiting their rights under said drainage contract.

As to the first position taken, it is believed that said contract, in respect to the election of Crimp to an office in the corporation in which he was procuring a controlling interest, was not illegal in such sense as to deprive him of all rights as to money paid under it, and that, whether it was *ultra vires* or not, having been ratified by the board of directors, it would be valid as between the parties, and as to all persons whose rights were not injuriously affected by it.

The second position taken, that this was a contract of partner-

Report of Wm. M. Booth, Master in Chancery, filed [illegible] 21, 1894.

ship, has strong reasons to support it, and there appears to be little doubt that, at least as between themselves, either McCormick, Crimp and the McCormick Construction Company, or else the first two under the name of the last, were copartners.

It is not deemed essential, however, to pursue the investigation of these points further.

234 Whether Crimp was a partner or a stockholder is believed to be immaterial, as in either character he could not assert a valid claim as against the *bona fide* creditors of the McCormick Construction Company.

In the view which the master takes of the questions presented it will only be necessary for him to present at length his reasons and conclusions as applied to the claims advanced on behalf of the complainant, and to the first and third positions taken on behalf of the objecting creditors.

The first point to be considered is the wording of the contract itself. It will be noted that the words loan, pledge and interest do not appear therein as relating to said $25,200 payment; nor is the word compensation used as it frequently is in contracts providing for a share of profits. This in itself is very significant in a contract which is claimed to be purely a contract for a loan of money on security.

In the preamble it is stated that said Crimp "is desirous of becoming interested" in said construction company. The contract further provides that he shall pay to said construction company $25,200, in consideration whereof there shall be assigned to him 126 shares of its capital stock (owned by McCormick), of the par value of $200 a share; that he shall be at once elected a director and vice-president of said company, and shall enter and personally assist in operating and managing said company and its business and affairs without salary; that he shall be entitled to fifty per cent.
235 of the net profit derived by the construction company under its drainage contract.

It was alleged in the bill, and not denied, that said contract was ratified by the board of directors of said construction company, and that said Crimp was elected a director and vice-president thereof, and that he did enter and personally assist in operating and managing said company and its business and affairs.

Report of Wm. M. Booth, Master in Chancery, filed July 21, 1894.

It appears to the master that a consideration of the wording of said contract taken in connection with the acts of the parties thereto leads inevitably to the conclusion that this was not a contract for a loan, but for a purchase of stock.

In the first place it is to be noted that the words "is desirous of becoming interested in," etc., are not such words as would ordinarily be used as preliminary to a contract for a loan of money, but are entirely consistent with a purchase of stock.

Secondly: The amount agreed to be paid by Crimp was exactly the par value of 126 shares of stock. As the money was expressly agreed to be used for the purpose of paying off the existing liabilities as shown by the schedule attached to the contract, it would have appeared a more natural course if a sum had been named exactly sufficient to cover such liabilities, *i. e.*, if this was a mere borrowing of money for that purpose. On the other hand, it will be noted that the 126 shares were just enough to constitute a
236 controlling interest in the corporation—the entire number of shares being 250.

Thirdly: It is not stated anywhere in the contract that this is a loan, and that the stock is pledged to secure its repayment, and is to be so held as a pledge. On the contrary, the contract states that such stock shall be assigned and issued to said Crimp, speaks of his "ownership" of it, and refers to the money as being "invested?" in said stock. If it were a mere pledge it would not, even if transferred to him on the books of the corporation, constitute him a stockholder in the sense of entitling him as such to vote at corporation meetings or hold office, although he would be such as to corporate creditors. Yet the contract itself provides that Crimp shall be elected a director and vice-president, and it is admitted that he was so elected and did so serve. The fact that this was a Missouri corporation and that under the laws of Missouri directors of corporations organized under the laws of that state must be stockholders, appears to the master to afford conclusive evidence that the parties to the contract in question intended said transaction to be a purchase of stock and not a mere pledge. It is not believed that the status of affairs would be materially affected by an agreement for re-sale of the stock at the original purchase price after the important work which the contract mentioned had been accomplished.

237 It is a significant fact that the contract contains no provision

for the giving of a note or other evidence of indebtedness by the construction company for the $25,200 as would be the natural course in the case of a loan, whereas the eighth clause, which clearly contemplates the loan of the $7,000 there mentioned, provides in distinct terms for the giving of notes for that amount by the corporation to bear interest at 7 per cent. per annum.

It is believed that the contention that the $25,200 or so much thereof as may have been paid was in the intention of the parties or in legal effect a loan to the construction company on security cannot be sustained.

It only remains to consider what effect the guaranty made by McCormick and the McCormick Construction Company would have on the rights of the various parties, and the question arises—assuming that it was the intention to absolutely guarantee to Crimp the return of his $25,200 invested in stock and any other sums advanced, and his agreed proportion in profits, and for that purpose to pledge to him the said contract with the sanitary district, would such agreement constitute him a preferred creditor of said construction company with the right to be first satisfied out of the proceeds of the sale of said drainage contract? It is believed that it would not.

238 In the foregoing contract, McCormick and the McCormick Construction Company are for all practical purposes one and the same (they owning nine-tenths of the capital stock), and they are in fact in the contract itself linked together as the party of the first part. The situation in its essence is the same therefore as if the stock purchased by Crimp were purchased directly from the corporation. In other words, it is believed to be immaterial whether McCormick, owning the stock, gave it back to the corporation to sell to Crimp, or whether McCormick himself sold the stock to Crimp and contracted that the money should be paid to the corporation. The corporation would then appear as guaranteeing to a stockholder (and securing that guarantee by the pledge of the most valuable assets of the corporation), the return absolutely and at all events of the very money with which he purchased his stock, in other words, of his contribution to the capital stock, and this, too, not only as against other stockholders, but as against *bona fide* creditors of the corporation. This the law will not permit. A corporation may create preferred stock and guarantee a given percentage of profits, but the claims of such stockholders are always held inferior to those of creditors of the corporation, and to be

Report of Wm. M. Booth, Master in Chancery, filed July 21, 1894.

paid out of the net profits, when all creditors have been paid. They cannot be paid out of the capital stock. A fortiori the corporation cannot guarantee the return to a stockholder of his contribution to the capital stock itself, to the very fund to which
239 the corporate creditors look, and are entitled to look, first for payment of their claims.

For the reasons above given the master finds:

1. That in executing the agreement of July 24th, 1893, hereinbefore set forth, it was the intention of the parties thereto, that W. G. Crimp should become and that he did become in the full sense a stockholder in the McCormick Construction Company.

2. That the alleged pledge of the said drainage contract to secure the repayment to Crimp of any sums advanced in pursuance of the said contract of July 24th, 1893, was and is illegal and void as against creditors of the McCormick Construction Company.

3. That the complainant is not entitled to have her claim rank as a preferred claim against the proceeds of the sale of said drainage contract.

4. That the complainant is not entitle to rank as a general creditor of the said McCormick Construction Com she has no right to share in the assets of said corpo of its bona fide creditors have been paid in full.

Replication, filed Aug. 18, '94.

Respectfully submitt

WILLIAM M. BOOTH,
Master in Chancery of said Court.

Chicago, July 20th, 1894.

Master's fees for hearing and report, $250.00.

Stenographer's fees for attendance 1¼ days, $12.50.

[Endorsed]: Filed Jul. 21, 1894.

S. W. BURNHAM,
Clerk.

filed
94.

240 Afterwards, to wit: on the eighteenth day of August, 1894, came Eugenia Crimp, complainant, by her solicitor, and filed in the clerk's office of said court her replication to the answer of McCormick Construction Company and R. P. McCormick, which said replication is in the words and figures following, to wit:

REPLICATION.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS, } ss.
NORTHERN DIVISION.

IN THE CIRCUIT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF ILLINOIS.

Eugenia Crimp
vs.
McCormick Construction Company and R. P. McCormick. } *In Chancery.*

The replication of Eugenia Crimp, Admx., complainant, to the answer of McCormick Construction Co., and R. P. McCormick.

The repliant saving and reserving to herself now, and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer of the said defendants, for replication thereunto says that she will aver, maintain and prove her bill of complaint to be true, certain and sufficient in the law, to be answered unto, and that the said answer of the said defendants is uncertain, untrue and insufficient to be replied unto by this repliant without this, that any other matter or thing whatsoever, in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and
241 avoided, traversed or denied is true. All which matters and things this repliant is ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by her said bill she has already prayed.

R. N. BAYLIES,
Solicitor for Complainant.

[Endorsed]: Filed Aug. 18, 1894.

S. W. BURNHAM,
Clerk.

On the same day, to wit: the eighteenth day of August, 1894, came Eugenia Crimp, by her solicitor, and filed in the clerk's office of said court her exception to the report of Wm. M. Booth, Master in Chancery, which said exceptions are in the words and figures following, to wit:

EXCEPTIONS TO MASTER'S REPORT.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS, } ss.
NORTHERN DIVISION.

Eugenia Crimp,
Complainant,
vs.
The McCormick Construction Company *et al.*
Defendants.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Exceptions of Eugenia Crimp, complainant, to the report and findings of Wm. M. Booth, Master in Chancery.

Exceptions to Master's Report, filed Aug. 18, '94.

242 Comes now Eugenia Crimp, complainant, by R. N. Baylies her solicitor, and files these her exceptions to the report and findings filed herein by Wm. M. Booth, Master in Chancery to whom this cause was referred by order entered the 10th day of July, 1894, and alleges the following specific grounds for exception thereto, to wit:

First: Said report does not find the amount of indebtedness of the McCormick Construction Company and R. P. McCormick to this complainant, when it should have been found that they were

Exceptions to Master's Report, filed Aug. 18, 1894.

indebted to her for all sums advanced and paid as alleged in the bill of complaint.

Second: There is error in the first findings of the Master in that he finds that under the contract between the McCormick Construction Company and R. P. McCormick of the first part and W. G. Crimp, of the second part, which contract is set out in said report, that said Crimp became a stockholder in the McCormick Construction Company, when he should have found and reported that said McCormick was a creditor of said McCormick Construction Company.

Third: There is error in the second finding in that it is found that the alleged pledge of the contract with the Drainage Canal was illegal and void as against the creditors of the Company, when it should have been found that there was a legal and binding pledge of said contract to secure all sums of money advanced to said company by said W. G. Crimp as against the creditors of said company.

243 Fourth. There is error in said report and findings in that it is found in finding No. 3, and reported that said Crimp under said contract did not become a preferred creditor of said McCormick Construction Company when he should have found that said Crimp under said contract became a creditor of the McCormick Construction Company to the amount of all moneys paid by him to said company, to wit: the sum of $28,200.00, that he held the stock of McCormick and the contract with the drainage board as collateral security for the money so advanced and that said claim and interest from the time the same was so advanced is a preferred claim upon the funds derived from the sale of said contract as against each and all the other parties hereto.

Fifth. There is error in said report in that it is found that complainant is not either a preferred or general creditor of the McCormick Construction Company as against the creditors of said company in any amount, when it should have found that she was a creditor to some amount.

Sixth. There is error in said report in that the master has failed to consider all the questions referred to him by the court and to file his report thereon within the time prescribed in said order of reference.

Wherefore complainant does except to said report, and appeals therefrom to the judgment of this court.

R. N. BAYLIES,
Solr. for Complainant.

[Endorsed]: Filed Aug. 18, 1894.

S. W. BURNHAM,
Clerk.

245 On the same day, to wit: the fifth day of December, in the adjourned October term of said court, 1894, in the record of proceedings thereof in said entitled cause before the Hon. Peter S. Grosscup, District Judge, appears the following entry to wit:

Eugenia Crimp, Executrix, etc.,
vs.
McCormick Construction Company and R. P. McCormick.
} *In Chancery.* 23,174.

246 This cause having come on to be heard, on the exceptions filed by complainant to the report of William Booth, Esq., one of the masters of this court, to whom, by order entered July 10, 1894, the issues framed by the pleadings herein relating to the claim of the complainant were referred to hear and report with his findings thereon, which said report was filed herein July 21, 1894, and said master having found and reported among other things that the complainant is not entitled to have her claim rank as a preferred claim against the proceeds of the sale of the drainage contract now in the hands of the receiver of this court, and that complainant has no right to share in the assets of said McCormick Construction Company until all its *bona fide* creditors have been paid in full. Record Entry.

And the court having heard the arguments of counsel for said complainant and for the general creditors of said company and for the receiver and notice to counsel for defendants, McCormick and McCormick Construction Co., respectively, and duly considered the matter, it is now, on this 5th day of December, 1894, ordered adjudged and decreed that the said exceptions be and are hereby

Record Entry.

overruled, and said master's report be and is hereby in all things confirmed, and that the assets of the McCormick Construction Company be distributed and paid to and among the *bona fide* creditors of said company, as the same have already been or may hereafter be ascertained, and until the same are paid in full, before any part thereof be paid to complainant; provided, however, that if the complainant have any just claim against the said McCormick Con-
247 struction Company, as a general creditor, for money loaned and advanced by said W. G. Crimp in his lifetime to said company over and above the sum of twenty-five thousand two hundred dollars ($25,200) in the bill of complaint and in said master's report mentioned, she may present and prove the same to the master as a general creditor, under the order of reference hereinafter made, subject to all proper objections thereto on the part of any one interested, and share in the distribution as a general creditor for the amount thereof, as the same may be finally ascertained. And whereas this cause was heretofore referred to E. B. Sherman, one of the masters of this court, who by order entered January 5, 1894, was ordered to notify all creditors of the McCormick Construction Company so far as the same could be ascertained, that certain assets of said company had been sold for the sum of forty-one thousand dollars ($41,000) and that all persons having claims or demands of any nature against said company should appear and present the same before said master before January 20, 1894, and that said master receive and report the same with the evidence thereof to this court, and said master did thereupon make his report to this court, dated March 26, 1894, wherein were exhibited in detail a large number of claims which had been presented to him in pursuance of said order, aggregating exclusive of complainant's claim, the sum of thirty thousand one hundred seventy-seven dollars and sixty-two cents ($30,177.62) whereof he reported that certain claims therein particularly specified, with the names and addresses of the creditors and the amount of each claim were correct and should be allowed, no objection having been made thereto by the counsel for the receiver or any
248 claimant, and that the McCormick Construction Company was then justly indebted to said claimants for the amount of their several claims as therein set forth, which aggregated the sum of nine thousand one hundred thirty-two dollars and twenty-four cents ($9,132.24) and that as to the remainder of the claims presented to him, objections to the allowance thereof had been made by various parties, and that the same ought not to be allowed without further proof of their nature, amount and validity, which said claims, exclusive of those of the complainant herein, aggregated

Record Entry.

$21,045.38. And by a supplemental report dated October 2, 1894, said master recommended the allowance of a claim of the Atchison, Topeka and Santa Fe Railway Company for the sum of $140.94, and whereas it appears to the court that the amount now in the hands of the receiver is ample for the full payment and satisfaction of all the claims which have been presented against the said McCormick Construction Company, other than the sums claimed by said complainant under the agreement between said W. G. Crimp, deceased, and the said R. P. McCormick and the McCormick Construction Company of July 24th, 1893, in the bill of complaint and the report of said William Booth, master, mentioned, and no cause being shown or appearing why the claims of the general creditors, so far as they have been ascertained and recommended for allowance by said Master Sherman, should not be allowed and paid.

It is further ordered, adjudged and decreed that the said report of E. B. Sherman, Esq., Master, of date March 26th, 1894, and his supplemental report of October 2nd, 1894, be approved
249 and that all of the claims therein and thereby reported and recommended to the court for allowance as correct and just claims against the McCormick Construction Company be, and they are hereby allowed and confirmed for the amounts therein specified respectively.

It is further ordered that this cause be referred back to the said E. B. Sherman, Master, to take further proof and report, with his findings thereon, within thirty days from this date, on the said claims so objected to and not allowed, not including, however, the claim of the complainant, except for moneys which may have been advanced by said W. G. Crimp, in his lifetime, over and above the said sum of $25,200 hereinabove referred to, and all questions concerning the disposition of any surplus which may remain after payment of the general creditors, are reserved until the coming in and consideration of said report.

250 On the same day, to wit: the fifth day of December, in the adjourned October term of said court, 1894, in the record of proceedings thereof in said entitled cause, before the Hon. Peter S. Grosscup, District Judge, appears the following entry to-wit:

Eugenia Crimp,
Executrix,
23,174 *vs.* } *In Chancery.*
The McCormick Construction Company
et al.

Record Entry.

The court finding on proofs made in that behalf that pursuant to the order entered herein on the nineteenth day of January last, the Northwestern National Bank of Chicago, on the twenty-second day of said January gave notice to the several parties in this cause of the filing of its intervening petition pending herein, and of the rule to answer said petition contained in said order, and none of said parties having answered said petition except Patrick J. Sexton, the receiver in this cause, and Eugenia Crimp, executrix, the complainant therein, it is thereupon now ordered by the court, that said intervening petition be and the same hereby is taken for confessed by all of said parties other than said Patrick J. Sexton, receiver, and said Eugenia Crimp, and it is further ordered that the issues made by the answers of said Patrick J. Sexton, receiver and Eugenia Crimp, to said petition, be and the same hereby are referred to Elijah B. Sherman, Esq., one of the masters in chancery of this court to hear and take proofs thereon and to report the same
251 to this court with his conclusions of law and fact thereon.

Afterwards to-wit: on the first day of May, 1895, came E. B. Sherman, Master in Chancery, and filed in the clerk's office of said court his report, which said report is in the words and figures following, to-wit:

Master's Report.

In the Circuit Court of the United States, for the Northern District of Illinois, Northern Division.
In Chancery.

Eugenia Crimp, *Executrix*,
v.
R. P. McCormick and the McCormick Construction Company.

In the matter of the claims filed against said company.

To the Hon. Peter S. Grosscup, Judge of said Court:

Report of E. B. Sherman, Master in Chancery, filed May 1, 1895.

The undersigned, Master in Chancery, to whom by a decretal order entered therein on the 5th day of December, 1894, the above entitled cause was referred to take proofs and report with his findings thereon touching certain claims theretofore filed but objected to and not allowed by the former report of the master in said cause, respectfully reports.

That said cause was set down for hearing for the purposes in said order specified, on Tuesday, the 11th day of December, 1894 that the hearing therein was adjourned from time to time and testimony taken touching certain of said claims, as more fully appears in the record hereof which is hereto attached and made a part
252 hereof, that after considering the claims filed in said cause and the testimony so taken, and having heard arguments of counsel, the master finds:

I.

That on the hearing, objections were withdrawn as to the following claims, and being found correct they are allowed by the Master:

F. Beuttenmuller, Joliet	$8 00
Illinois Steel Company, Chicago	565 13
W. P. Waugh, St. Louis	45 17

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II.

By the terms of the decretal order above mentioned, the Master was directed to inquire as to the claim of Eugenia Crimp, executrix, for the money advanced by W. G. Crimp, deceased, in his life time, to the defendant construction company, first deducting therefrom the sum of $25,200. The Master finds that the moneys so advanced by said W. G. Crimp, deceased, in his life time, were $28,183.34, deducting therefrom $25,200 leaves remaining $2,983.34, which the Master finds to be a valid claim in favor of Eugenia Crimp, executrix.

A further claim was filed by Eugenia Crimp, executrix, for $740, touching which the Master finds the following facts:

That some time in July, 1893, the firm of Smith, Crimp & Eastman, of which W. G. Crimp, deceased, was a member, owned and had in its possession a pair of horses, wagon and harness, 253 and two car-loads of lumber; that by consent of the said firm said Crimp took possession of said horses, wagon, harness and lumber and sold and delivered it to the McCormick Construction Company, and it was by said company used in and about its said business, that some other property was also taken by said Crimp and delivered to said company, but the amount of value thereof cannot be ascertained; that the lumber was used by said company in the prosecution of its business and was worth $12 per thousand or $240; that the horses, wagon and harness were also used by said defendant company and were part of the assets which passed to the receiver herein; that the Master finds the value of said horses, wagon and harness to have been $500.

That it is claimed on behalf of certain objecting creditors that the evidence does not show that there was any lawful claim on behalf of the estate of said Crimp, but that if any claim was proven it was on behalf of said firm of Smith, Crimp & Eastman since it did not appear that any final settlement had been made of the partnership affairs of Smith, Crimp & Eastman; that the Master is of the opinion, however, that the claim is a just one and properly filed on behalf of Eugenia Crimp, executrix; that the property in question was delivered by said Crimp in his life time to said defendant company and by it used in and about the prosecution of its own business and became part of the assets of the company; that Smith, Crimp & Eastman have filed no claim therefor and that they must be presumed to have assented and now to assent to the filing of

said claim on behalf of Eugenia Crimp, executrix, that the
254 Master therefore finds that the said claim of $740 should be allowed, that after the conclusion of the testimony and the arguments in said cause, the attorney for Eugenia Crimp, executrix filed with the Master the disclaimer of the firm of Smith, Crimp & Eastman, a copartnership, to any claim or right of action against the said defendant company for any interest whatever in and to the said property, which disclaimer is filed herewith.

III.

Claim on Consolidated Coal Company.

Touching the claim of the Consolidated Coal Company of St. Louis, the master finds that claimant sold and delivered to the defendant company divers quantities of coal which were used in and about its business between the 7th day of August and the 3rd day of November, 1893, that there was due at the time of the filing of the bill and the appointment of the receiver herein, to the claimant by the defendant company, $970.60, that the claimant commenced suit in attachment in the Circuit Court of Will County and attached certain property to satisfy said claim, that in and about the prosecution of said suit and for the cost of keeping certain mules after the appointment of the receiver, claimant expended the sum $87.10 which should be added to and constitute a part of its claim, that the defendant company is indebted to said claimant in the sum of $1,057.70, that the lien of claimant by virtue of said attachment, will be discussed below.

IV.

Claim of Henry McGurren, *et al.*

255 Touching the claim of Henry McGurren and others, the master finds that by a written agreement entered into on the 12th day of July, 1892, between the defendant company and claimants, claimants agreed to furnish a bond for said defendant company as required by the Sanitary District of Chicago, in the sum $100,000, that defendant company agreed to pay to claimants for furnishing said bond the sum of $3,500 at the times therein specified, that said claimants furnished said bond and became liable thereon, that all of said $3,500 had been paid to claimants before the filing of the bill herein, except $500 which the master finds to be a just and valid claim.

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V.

Claim of Repauno Chemical Company.

Touching the claim of the Repauno Chemical Company of Chicago, the Master finds the facts to be that the claimant furnished the defendant company, pursuant to its request and ordered powder and other material used in blasting rock, that such material so furnished was kept by the claimant in a receptacle near the place where the said defendant company was engaged in blasting rock, and delivered such material to defendant company from time to time, as it was needed by it in the prosecution of business, that after the defendant company ceased to carry on business, claimant took from said receptacle whatever supplies and material were then on hand there, which were credited by claimant to defendant company, that claimant has a just and valid claim
256 against defendant company for the sum of $3,072.69 for such materials so delivered to defendant company and by it used in its business.

VI.

Touching Claims Secured by Chattel Mortgages.

Touching the claims of Ingersoll-Sergeant Drill Company of New York, Parker, Melcher & Ingraham, of Chicago, Parker, Melcher & Ingraham, assignee of Charles W. Melcher Machinery Company, Moses P. Johnson Machinery Company of St. Louis, Northwestern National Bank of Chicago, and the joint claim of Parker, Melcher & Ingraham, Ingersoll-Sergeant Drill Company, Moses P. Johnson Machinery Company and Northwestern National Bank, for expenses in foreclosing the second chattel mortgage, the Master finds.

1. That there is no ground for controversy touching the amount of these claims except as to the joint claim for expenses incurred in and about the foreclosure of the chattel mortgage.

2. That a controversy exists between these claimants and the unsecured creditors as to the validity of the two chattel mortgages made by the defendant company, which chattel mortgages covered nearly all the personal property of the defendant company employed in its said business, that solicitors for the unsecured creditors

claim these mortgages to be invalid, that these claimants all agree that the second mortgage is valid.

3. That a controversy exists between Ingersoll-Sergeant Drill Company and the other above named claimants as to the validity of the first chattel mortgage, the Ingersoll-Sergeant Drill Company, the mortgagee therein, claiming it to be valid, and the other
257 claimants insisting that it is invalid.

4. The Northwestern National Bank of Chicago, having filed an intervening petition herein, which by a separate order has been referred to the master to hear and take proofs thereon and to report to the court with his conclusions of law and fact and said bank having requested the master to make a separate report touching its claim, the master will not consider or find as to the claim of said bank herein, excepting in so far as it becomes necessary to consider that claim in connection with the other claims secured by said chattel mortgages for the purpose of stating the facts and deciding the question of law raised in that behalf.

VII.

Touching the First Chattel Mortgage.

That Ingersoll-Sergeant Drill Company, a corporation, in October, 1892, began to sell and deliver to defendant company boilers, drills and machinery of various kinds used in the drilling and blasting of rock, that in July, 1893, defendant company had become largely indebted to said drill company for machinery, &c., so furnished it, that said drill company, through its agent, Parker, Melcher & Ingraham, strenuously insisted upon payment of the balance due, but without success, that on the 20th day of July, 1893, said defendant company, being so indebted to the said drill company, the amount of the indebtedness being then unadjusted and unknown, made, executed, acknowledged and delivered to said drill company, through its agent, Parker, Melcher & Ingraham, a chattel mortgage, of which the following is a copy:

Know all men by these presents. That we McCormick Con-
258 struction Company, a corporation organized and existing under and by virtue of the laws of the State of Missouri, with our principal office at Chicago, Illinois, in consideration of the sum of eight thousand five hundred dollars ($8,500.00) to us paid by The

Ingersoll-Sergeant Drill Company, a corporation organized and existing, under, and by virtue of the laws of the State of West Virginia, with its principal office at New York City, the receipt whereof is hereby acknowledged, do hereby grant, sell, convey and confirm unto the said Ingersoll-Sergeant Drill Company and to its successors and assigns, the following goods and chattels, to-wit:

Two 3¼'' Sergeant tripods complete with weights, three 3¼'' Ingersoll tripod legs with bands and set screws, four sets 3¼'' Ingersoll tripod weights, one 3¼'' E2 steam chest complete, six E24 Sergeant Pawls, two 7'' stiff-back boiler track channelers with all track, tools, scrapers, steels to 13' 6'', pumps, suction hose and pipe, two F2 Ingersoll drills complete with tripod (no weights), one sand pump six F2 tripod weights, one F2 rotating ratchet, one E24 3¼'' Sergeant Auxillary valve, two E24 standards and nuts, two E24 bushings, six F2 Pawls, twelve F2 Pawl springs, fifty feet of extra portable sectional track for channelers, one A24 shell one-half E24 steam front head, one E24 rotation rachet, two 7'' stiff back second hand boiler track channelers with all track, tools, scrapers, steels to 13' 6'' pumps, suction hose and pipe, two steels 5'' wide 108'' long, two steels 5'' wide 126'' long, two steels 6'' wide 108'' long, three steels 6'' wide 126'' long, twelve F2 cylinder buffers, twelve F2 valve buffers, six F2 U bolts and nuts, six U bolts, one swage, one spreader I lot 259 channeler and drill, duplicating parts and supplies, and all other goods which may be hereafter sold and delivered by the Ingersoll-Sergeant Drill Company to McCormick Construction Company, all of which goods and chattels are now located in the Town of Lockport, in the County of Will, and State of Illinois, on the line of the main drainage channel of the Sanitary District of Chicago, and for use in the excavation of said drainage channel and are intended to be used during the period covered by this conveyance, by the said parties of the first part along the line of said drainage channel within the County of Will in excavating the same.

To have and to hold all and singular the said goods and chattels unto the said grantee herein and its successors and assigns to it and their sole use forever. And the grantors herein for themselves and heirs, executors and administrators do hereby covenant to and with said grantees, its successors and assigns that the said grantors are lawfully possessed of the said goods and chattels as of their own property, that the same are free from all incumbrances, and that they will and their executors and administrators shall warrant and

defend the same to the said grantee, its successors and assigns, against the lawful claims and demands of all persons.

Provided, nevertheless, that if the said grantors, their executors or administrators shall well and truly pay unto the said grantee, its successors and assigns the sum of eight thousand five hundred dollars.....
.....
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260 According to the tenor and effect of four notes of even date herewith executed by said grantors and due and payable to the said grantee as follows:.....
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all of said notes bearing interest at the rate of seven per cent. per annum, then this conveyance is to be void, otherwise to remain in full force and effect.

And provided, also, that it shall be lawful for the said grantors their executors, administrators and assigns to retain possession of said goods, and chattels, and at their own expense to keep und use the same until they or their executors, administrators or asssigns shall make default in the payment of the said sums of money
261 above specified either in principal or interest at the time or times and in the manner hereinbefore stated. And the said grantors hereby covenant and agree that in case default shall be made in the payment of the notes aforesaid or any or either of them or any part thereof, or the interest thereon on the day or days respectively on which the same shall become due and payable, or if the grantee, its successors or assigns shall feel itself insecure or un-

safe, or shall fear diminution, removal, or waste of said property, or if grantors shall sell or assign or attempt to sell or assign the said goods and chattels or any interest therein, or if any writ or any distress warrant shall be levied on said goods and chattels or any part thereof, then and in any or either of the aforesaid cases all of the said notes and sums of money, both principal and interest, shall at the option of said grantee, its successors and assigns, without notice of said option to any one, become at once due and payable and the said grantee, its successors and assigns, or any of them, shall thereupon have the right to take immediate possession of the said property and for that purpose may pursue the same wherever it may be found and may enter any of the premises of the grantors with or without force or process of law wherever the said goods and chattels may be or be supposed to be and search for the same and if found take possession of and remove and sell and dispose of the said party or any part thereof, either at public auction to the highest bidder after giving five days notice of the time, place and terms of sale, together with a description of the property to be sold by notices posted up in three public places in the vicinity of such sale or at private sale with or without notice, for cash or on credit,

as the said grantee, its successors and assigns, agents or attor-
262 neys or any of them may elect, and out of the money arising from such sale, to retain all costs and charges for persuing, searching for, taking, removing, keeping, storing, advertising and selling such goods and chattels, and all prior liens thereon, together with the amount due and unpaid upon said notes, rendering the surplus if any remain, unto said grantors or their legal representatives.

Witness the hands and seals of the said grantors, this 20 day of July, in the year of our Lord, 1893.

R. P. McCORMICK. (Seal.)
President.

[Seal of the Company.] W. P. WAUGH, (Seal.)
Secretary.

STATE OF ILLINOIS, }
COUNTY OF WILL. } ss.

I, Homer R. Clark, a justice of the peace and notary public in the town of Lockport, and for said county, do hereey certify that this instrument was duly acknowledged before me by the

above named R. P. McCormick, president of the McCormick Construction Company, and W. P. Waugh, secretary of the McCormick Construction Co., the grantors therein named, and entered by me this twentieth day of July, A. D. 1893. Report of E. B. Sherman, Master in Chancery, filed May 1, 1895.

Witness my hand and seal.

[NOTARIAL SEAL.] HOMER R. CLARK, (Seal.)
Justice of the Peace
and Notary Public.

263 That said chattel mortgage, however, was not placed on record until the 13th day of November, 1893, at 3:37 o'clock P. M., that at the time said mortgage was executed no notes of any kind were made or delivered by defendant company to said Drill Company, that subsequent to the execution of the mortgage further efforts were made by said Drill Company to collect a part at least of the money due it, that on the 29th day of September, 1893, defendant company gave to said Ingersoll-Sergeant Drill Company a draft on the Northwestern National Bank for $1,000, which has not been paid, and its five notes, all dated on said 29th day of September, the first for $500 due in sixty days, the second for $799.80 due in ninety days, the third for $1,799.80 due in six months, the fourth for $1,799.80 due in nine months, the fifth for $1,799.80 due in twelve months from date, the four last notes being with interest at six per cent. from date, that so far as the evidence shows these are the only notes made by the defendant company to said drill company after the execution of said mortgage, until the 14th day of November, 1893, that said five notes and check represented in the aggregate more than the amount then due by defendant company to said drill company, that a part of such indebtedness, but how much the evidence does not disclose, had accrued after the execution and delivery of said chattel mortgage, that about $700 had been paid on account between July 20th and September 29th, 1893, that the word "four" before the word "notes" in said first mortgage is written in pencil and apparently in a different handwriting from the other written parts.

VIII.

TOUCHING THE SECOND CHATTEL MORTGAGE.

That on the 14th day of November, 1893, said defendant
264 company made, executed, acknowledged and delivered a chat-

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tel mortgage to the Ingersoll-Sergeant Drill Company, Northwestern National Bank, Moses P. Johnson Machinery Company and Parker, Melcher & Ingraham, all corporations, conveying to them all the property contained in said first mortgage, and some property in addition thereto, that said last mentioned mortgage was executed and acknowledged by the president of defendant company, who was also its general manager, and who was then and had been in actual charge of the business thereof, and also by its secretary, that said mortgage was executed pursuant to action taken at a meeting of the board of directors of said company at which two directors, namely, said president and secretary were present, that it does not appear by the evidence what the number of the directors of said company was, nor whether notice was given to any other directors, if there were any others, of the time, place, or object of said meeting, that before the execution of said second mortgage, the attorneys, Messrs. Weigley, Bulkley & Gray, who drew the same on behalf of all the mortgagees, advised that under the peculiar provisions of the chattel mortgage act, it might be unsafe to execute the same without the consent of the mortgagee in the first mortgage first obtained, that thereupon they applied to Mr. English, the attorney for Ingersoll Sergeant Drill Company, for such consent, that a written consent was made by Mr. English on behalf of the mortgagee in the first mortgage, that the document itself had been lost or mislaid, but that it appears from the evidence that such consent was given without waiver of the rights of the mortgagee in the first mortgage, that said second mortgage recited

265 that it was conditioned that said defendant company pay four certain promissory notes, one for $9,000, payable to the Ingersoll-Sergeant Drill Company, one for $3,000 payable to the Northwestern National Bank, one for $1,740 payable to Moses P. Johnson Machinery Company, one payable to Parker, Melcher & Ingraham for $750, all said notes being of even date with said second mortgage and all payable on demand, that said second mortgage was in the ordinary form of chattel mortgages and was executed and acknowledged by said defendant company by R. P. McCormick, President, and W. P. Waugh, secretary thereof, that at the time that said second mortgage was acknowledged by McCormick as president of said mortgagor he was considerably intoxicated, although his condition was not such as to render him incompetent to make such acknowledgment, that said second mortgage was filed for record in Will county, in which said personal property was situated on the 14th day of November, 1893, at 4:42 o'clock P. M. that as soon as the same was recorded and on the evening of the same day Edgar Ingraham, who was then and there an agent

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of the Ingersoll-Sergeant Drill Company, and had gone to Joliet with said second mortgage to cause the same to be recorded, accompanied and assisted by Mr. Johnson, president of the Moses P. Johnson Machinery Company, took the said second mortgage and went to the camp where the said defendant company have been engaged in business, and where the property in said second mortgage described was situated, and then and there on behalf of the mortgagees in second mortgage, and under the provisions thereof, took possession of all the property described in the said second mortgage, locked up the barn and other buildings, and stationed himself in the office of the company, appointed custodians to assist in caring for and preserving the
266 property and through such custodians and agents, and on behalf of said mortgagees, retained possession of said property in said second mortgage described until the said property was surrendered to the receiver appointed herein, that notices of the sale of said property described in said second mortgage were made by the said Ingraham, or under his direction, and were fastened to some of the buildings of the company and to the machinery in said chattel mortgage described, that among others said Ingraham and Johnson employed a constable of the village of Lockport, named Fred Faust, and placed him in charge of said property as custodian, that said Faust as such custodian in charge of said property, while in possession thereof, incurred expenses to a considerable amount which were paid by Parker, Melcher & Ingraham to the extent of $261.04, that said bills so paid by said Faust were, in connection with an affidavit made by him on the 16th day of January, 1894, filed as Exhibit A, the heading to which said bills was as follows: "Bills paid by Parker, Melcher & Ingraham for account of the mortgagees of the McCormick Construction Company"; that further vouchers were filed by said Faust in connection with said affidavit as Exhibit B, at the head of which appeared the following: "Unpaid bills against the mortgagees of the McCormick Construction Company"; that said unpaid bills, according to said affidavit of said Faust then amounted to $411.50; that on the 13th day of January, 1894, William A. Parker, president of Parker, Melcher & Ingraham, and one of the agents of the Ingersoll-Sergeant Drill Company, filed and verified "the joint claim of
William A. Parker, Parker, Melcher & Ingraham, the Inger-
267 soll-Sergeant Drill Company, Moses P. Johnson Machinery Company, the Northwestern National Bank of Chicago," in which affidavit it is recited that Parker, Melcher & Ingraham, Ingersoll-Sergeant Drill Company, Moses P. Johnson Machinery Company and the Northwestern National Bank were mortgagees

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in a certain chattel mortgage executed by the McCormick Construction Company on the 14th day of November, 1893, that thereafter, to wit, on the.....day.....1893, the said mortgagees, pursuant to the terms of said chattel mortgage, foreclosed the same by taking possession of all the property enumerated therein and advertising said property for sale, that the proper care and preservation of said property necessitated considerable outlay and expense, and that the same was kept and preserved in condition by said mortgagees at a total expense of $260, that these expenses were advanced by the said mortgagees in proportion to the amounts of their claims, each mortgagee making respectively the following advances: Ingersoll-Sergeant Drill Company, $162; Northwestern National Bank, $54; Moses P. Johnson Machinery Company, $31; Parker, Melcher & Ingraham, $13; that said Parker further states in said affidavit that he became the custodian and conservator of said property on behalf of said mortgagees and claimed $100 as a reasonable compensation therefor, that although said joint claim and said affidavit of Faust and bills accompanying the same were on file said Ingersoll-Sergeant Drill Company at no time, by any document or disclaimer filed before the master or any evidence offered on the hearing, repudiated either the authority of said Parker and Ingraham to incur said expenses on joint account, or to divide and apportion the same, nor is it denied that said parties
268 made the advances in the manner and to the extent set forth in said joint claim, that it does not appear by the evidence that said Ingraham and Johnson had the first mortgage in their possession or under their control at the time they so took possession of the property of defendant company under the second mortgage, nor does it appear by the evidence that they or either of them knew of the record of said first mortgage, that evidence was offered on behalf of Ingersoll-Sergeant Drill Company from which it appears that the value of the machinery and other property covered by the first mortgage was, at the time of their sale by the court, about $6,523.10, that no evidence was offered tending to show the value of the property contained in the second mortgage other than that contained in the first mortgage, nor was any evidence offered on behalf of any party tending to show the relative value of the property involved in the first mortgage compared with the entire value of the personal property sold under the order of court, nor was any evidence offered tending to show the value of the property attached by the Consolidated Coal Company, or its relative value as compared with the value of all said property so sold as aforesaid. And from the facts so stated, the master finds as conclusions of law:

I.

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That said second mortgage having been executed and acknowledged by the proper officers of said defendant company then actually in charge of the prosecution of its business, in the ordinary form, to secure a bona fide indebtedness of said company due to the mortgagees named therein, was a valid mortgage, that possession having been taken thereunder on behalf of the mortgagees therein, they had a valid lien upon the property in said mortgage described at the time the receiver took possession thereof, and that such lien now extends to the fund in the hands of the receiver as to the proceeds of the sale of the property included in said mortgage.

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II.

That while said first mortgage was of doubtful validity because no description was inserted of the notes secured thereby, no time fixed for the maturity of the indebtedness therein recited, no notes executed at the time of the execution of the mortgage, or at any subsequent time corresponding either in amount or in number to the notes referred to in the mortgage and because the notes executed to the Ingersoll-Sergeant Drill Company, the mortgagee therein on the 29th day of September, 1893, did not correspond in number or in amount to the recitals in the mortgage, and because the notes so executed on September 29th were in part for an indebtedness created after the execution of the mortgage on the 20th day of July, 1893, yet in the opinion of the master it is not necessary under the peculiar circumstances of this case to decide whether such first mortgage would or would not be valid as between the mortgagees therein and the unsecured creditors of said defendant company, that the master is of the opinion that the lien of said first mortgage, if any valid lien was created thereby, was as between the mortgagee therein and the joint mortgagees in the second mortgage, surrendered and abandoned, and that it was the intention of the mortgagee in said first mortgage to so abandon its claim thereunder and to accept in lieu thereof its proportionate interest in the said second mortgage for the following, among other reasons.

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(a) Said second mortgage was not made subject to the lien of the first mortgage, nor did it in any way refer thereto, although the largest creditor secured by the second mortgage was the mortgagee in the first mortgage.

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(b) Nothing whatever seems to have been done under the first mortgage, either before or after the execution and acknowledgment thereof, except to record the same on the 13th day of November, 1893; that while the evidence does not disclose who forwarded the said mortgage for record it must be presumed that it was not done by the agents of the Ingersoll-Sergeant Drill Company who acted for it in connection with the execution, acknowledgment, delivery, record and foreclosure of the second mortgage.

(c) Mr. Ingraham, who was actively connected with the execution of the said second mortgage, who went to Lockport to obtain the acknowledgment thereof, took it to Joliet for record, and thence immediately proceeded to the camp of the defendant company and foreclosed the same, and caused to be written and posted notices of the sale thereunder, was at the time, and had been theretofore acting as the agent of the Ingersoll-Sergeant Drill Company, mortgagee in the first mortgage, and his acts must be taken in that regard as the acts of his principal, the mortgagee in the first mortgage.

(d) To permit the mortgagee in the first mortgage to take as such the proceeds of the property therein described and then to have an interest in the second mortgage proportioned to the amount of its indebtedness secured thereby, in the residue of the prop-
271 erty therein described, other than that described in the first mortgage, would be, in the opinion of the master, wholly inequitable and to impute such intention to the agents of the mortgagee in the first mortgage, would be to impute to them bad faith toward their co-mortgagees in the second mortgage, and as good faith must be presumed in the absence of truth to the contrary, the master finds that such was not the understanding or intent of the parties to the second mortgage when the same was executed and the proceedings to foreclosure taken thereunder.

(e) While it was entirely proper for Mr. English, as attorney for Ingersoll-Sergeant Drill Company, not acting, however, in respect to the second mortgage, to consent to the second mortgage without waiving his rights under the first, it was also proper for the agents then acting for the Ingersoll-Sergeant Drill Company to make such waiver, as by their conduct they must be held to have done.

IX.

Touching the claims of mortgagees in the second mortgage for expenses, the master finds:

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That Parker, Melcher & Ingraham expended in and about the care of said property and the foreclosure of said second mortgage (1) the sum of $260, which was subsequently divided among the mortgagees in proportion to their claims secured as hereinbefore stated, which sums are therefore allowed by the master as part of the indebtedness of defendant company to them respectively; (2) the sum of $411.50 expended subsequently, which is allowed as a claim of said Parker, Melcher & Ingraham.

272 Touching these claims the master states that testimony was introduced tending to show that the custodians consumed some supplies belonging to the defendant company which were on hand, but what they were, or of what value, cannot be definitely ascertained from the proofs, and it appearing to the master from the evidence that this money was expended and liability incurred in good faith by Parker, Melcher & Ingraham in endeavoring to care for and preserve the property in the custody of the mortgagees, the master allows the same as a proper charge therefor.

Claim of William A. Parker.

That after possession had been taken of the said property by Mr. Johnson, and custodians placed in charge thereof, it was considered by the mortgagees that so much valuable and complicated machinery could not properly be left in the sole charge of custodians unfamiliar therewith; that Mr. William A. Parker, president of Parker, Melcher & Ingraham, was requested by those interested therein to visit the camp where said machinery was, to instruct the custodians how to care for the same, and to take supervision of said machinery, to visit and inspect the same from time to time, and to preserve the same from injury as far as possible; that in the discharge of this duty assigned him, Mr. Parker visited said camp frequently, and that his services in that regard were a part of the reasonable care which the mortgagees might properly exercise while in possession of the said property; that his claim of $100 for such services is moderate and reasonable compensation, and the master recommends its allowance and payment as a part of the proper expenses of the foreclosure.

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273 CLAIM OF INGERSOLL-SERGEANT DRILL COMPANY.

Balance due for goods	$9,495.04
Int. on 4 notes, $1,799.80 each from 9 29 93 to 4 20 95 at 6%	673.12
Int. on $589.16 9/29 93 to 4 20/95 at 5%	45.91
	$10,214.07
Paid Parker, Melcher & Ingraham pro rata expenses	$ 162.00
Total amount due	$10,376.07

CLAIM OF NORTHWESTERN NATIONAL BANK.

To note dated November 14, 1893	$3,000.00
To int. on do. from Jan. 24, '94 to April 20 95 at 5%	185.83
	$3,185.83
Amount paid on account of expenses of foreclosure as per statement	54.00
	$3,239.83

CLAIM OF PARKER, MELCHER & INGRAHAM.

Note dated November 14, 1893	$750.00
Int. on do. to April 20 95 at 5%	53.75
	$803.75
Balance account assigned to it by Charles W. Melcher Machinery Co	39.93
Paid as pro rata of $260 expense	13.00
Unpaid bills for foreclosure by it	411.50
	$1,268.18

CLAIM OF MOSES P. JOHNSON MACHINERY COMPANY.

274 Note dated November 14, 1894	$1,740.00	
Int. on do. to April 20 95 at 50%	124.70	
		$1,864.70
Paid on account expenses, &c.		31.00
Total amount due		$1,895.70

X.

Report of E. B. Sherman, Master in Chancery, filed May 1, 1895.

Touching the liens of mortgagees and attaching creditors, and their extent.

The entire plant of the defendant company, that included in the second mortgage, that on which an attachment was levied by the Consolidated Coal Company, as well as any other property, if there were any, in respect to which the evidence is not clear, having been sold under order of court for the lump sum of $8,000, and neither the mortgagees in said second mortgage nor said attaching creditors having introduced any evidence showing the relative value of the property on which they respectively had liens as compared to the whole property sold for $8,000, the master cannot find definitely what part of the said proceeds of said sale shall be paid to the joint mortgagees, and what part to the said attaching creditors, but the whole evidence considered, the master is of the opinion that said proceeds should be divided among the lienors in proportion to the amount of the sums for which lienors have liens, after first paying the expenses incurred in and about foreclosing said second mortgage and said attachment proceedings, to wit: in the following proportion:

275	Ingersoll-Sergeant Drill Company		$ 9,645.00
	Moses P. Johnson Machinery Company		1,864.70
	Parker, Melcher & Ingraham		843.93
	Northwestern National Bank		3,185.83
	Consolidated Coal Company		970.60
	Total amount liens		$16,510.06
	Total amount proceeds	$8,000.00	
	Less expense foreclosure	$771.50	
	Less expense attachment	87.10	858.60
	Residue for distribution		$ 7,141.40

Which is 43% and a fraction, a little more than ¼ of total amount of liens, and which being distributed on the foregoing basis pro rata, will give to

Report of E. B. Sherman, Master in Chancery, filed May 1, 1895.

Ingersoll-Sergeant Drill Company	$4,171.62
Moses P. Johnson Machinery Company	806.62
Parker, Melcher & Ingraham	365.05
Northwestern National Bank	1,377.97
Consolidated Coal Company	420.14
Total	$7,141.40

Respectfully submitted.
E. B. SHERMAN,
Master in Chancery of said Court.

April 20, 1895.

Master's fees for taking testimony, filing exhibits, hearing arguments of counsel, examining evidence, briefs and authorities, and making and filing master's report, $750.00.

[Endorsed]: Filed May 1, 1895.

S. W. BURNHAM,
Clerk.

On the same day, to wit: the first day of May, 1895, came
276 E. B. Sherman, Master in Chancery, to whom said cause had been referred by said court on the fifth day of December, 1894, to take proofs and report the same to the court, and files his report herein, which said report is in the words and figures following, to wit:

Master's Report.

In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

Eugenia Crimp
vs.
McCormick Construction Company
and R. P. McCormick.

In the Matter of the Intervening Petition of the North-Western National Bank.

To the Hon. P. S. Grosscup, Judge of said Court:

The undersigned, Master in Chancery of said court, to whom, by an order entered therein on the 5th day of December, 1894, said intervening petition was referred to take proofs thereon and to report the same to the court with his conclusions of law and fact thereon, respectfully reports: Master's Report, filed May 1, 1895.

That said cause was set for hearing for the purposes in said order specified, on the 4th day of January, 1895, that the testimony taken herein is made a part hereof and herewith returned into court, that having considered said intervening petition and the 277 answers thereto, and the testimony taken in connection with the proof of claim theretofore filed, and other testimony taken in said main cause, the master finds:

That on the 14th day of November, 1893, the said defendant McCormick Construction Company made, executed and delivered to said Northwestern National Bank its promissory note for $3,000, payable on demand to the order of said Northwestern National Bank, at Chicago, Illinois, that on the back of said note is the following endorsement: "Interest is paid on the within note to January 24th, 1894;" that there is now due by said McCormick Con-

Master's Report, filed May 1, 1895.

struction Company to said Northwestern National Bank on said note the said principal sum and interest thereon from January 24th, 1894, to the date hereof, at the rate of 5% per annum, that there is further due by said company to said bank the sum of $54 paid by said bank as its *pro rata* share of a bill of $260 expended by Parker, Melcher & Ingraham as agents of the mortgagees in a certain chattel mortgage made by said McCormick Construction Company, dated November 14th, 1893, to secure the said bank and other mortgagees therein for notes of the said McCormick Construction Company, secured thereby, said sum having been so expended in and about the custody, care and preservation of the property of said defendant company after the same was taken possession of by the mortgagees therein, and before the appointment of the receiver in the above entitled cause, that the entire sum so due to said Northwestern National Bank and said McCormick Construction Company is $3,239.53, as more fully appears by schedule A hereto attached and made a part hereof.

278 II.

That the property in said mortgage described, and some other property of said defendant company attached by the Consolidated Coal Company, an unsecured creditor of said defendant company, was sold under the order of this court for $8,000, that the *pro rata* share of the said $8,000, proceeds of the said sale, after paying therefrom the expenses of foreclosure, etc., chargeable thereto, which should be applied toward discharging the said indebtedness of said McCormick Construction Company to said Northwestern National Bank is $1,377.97.

III.

That since the entry of the order of reference herein, the following stipulation has been entered:

UNITED STATES OF AMERICA, } ss.
NORTHERN DISTRICT OF ILLINOIS. }

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION.

Eugenia Crimp,
Executrix, Etc.,
vs.
McCormick Construction Company *et al.*

In Chancery.
Gen. No. 23,174.

In the matter of the intervening petition of the North Western National Bank of Chicago.

It is in the matter of said intervening petition here
and agreed by and between said bank, Eugenia Crim
etc., and Patrick J. Sexton, receiver, by their resp
279 itors, that under the reference of said petition mad .... by
said court on the fifth day of December, A. D. 1894, Elijah B. Sherman, master in chancery, shall hear, find and report on the claims of said bank set up in its said petition, and that for and upon the cross demands or causes of action against said bank, set up or referred to in the answers of said receiver and of said Eugenia Crimp, executrix, etc., filed to said petition of said bank, said receiver, upon due leave of court shall cause an action at law to be brought against said bank, for the determination of the alleged liabilities of said bank thereon, which action shall be speeded to determination by the parties thereto respectively saving to each the right to due procedure and to lawful procedure in error therein, and that, until the final determination of said procedure at law, or until the further order of said Circuit Court of the United States, said bank shall be stayed in any satisfaction out of the funds and assets of the McCormick Construction Company in the hands of said receiver, of its said claims as they may be allowed and found upon or under its said petition, to the end that if such procedure at law shall result in a final judgment against said bank, said judgment may have equitable application *pro tanto* as set off against said claims of said bank as they may be so allowed and found, and that if said Circuit Court of the United States shall, before the de-

termination of said procedure at law, order any distribution to the creditors of the McCormick Construction Company from said funds and assets, there shall in that case be reserved to answer said claims of said bank a proportion of said funds and assets equitable upon the facts and circumstances of said distribution to the
280 end and in such wise that said bank shall not be prejudiced by said stay in its receiving ultimate satisfaction of its said claims out of said funds and assets, on the full and just scale of such distribution, in the event that said procedure at law shall result in judgment in favor of said bank. Given in triplicate on this fourth day of January, A. D. 1895.

MARCUS KAVANAGH,
Solicitor for Patrick J. Sexton, Receiver.
R. N. BAYLIES,
Solr. for Eugenia Crimp, Executrix, Etc.
CHARLES M. STURGES,
Solr. for Northwestern National Bank of Chicago.

Respectfully submitted.

E. B. SHERMAN,
Master in Chancery of said Court.

Chicago, April 20, 1895.

SCHEDULE A.

To note dated November 14, 1893.....	$3.000.00	
To int. on do. from Jan. 24, '94 to April.....	185.83	$3,185.83
Amount paid on account of expenses of foreclosure as per statement.....		54.00
Total amount due.....		$3,239.83

281 January 4, 1895.

In the matter of the claim of the Northwestern National Bank.

Present, Messrs. R. N. Baylies, Marcus Kavanagh, Weigley, Church, C. M. Sturges and Stubblefield.

Mr. Sturges: I will offer in evidence on behalf of the Northwestern National Bank of Chicago, the note described in its intervening petition, namely, a note for $3,000, dated Chicago, November 14, 1893, signed McCormick Construction Company by R. P.

McCormick, Pres., payable on demand after date to the order of the Northwestern National Bank, at Chicago, Illinois. Value received. Northwestern National Bank, exhibit number I. Master's Report. file May 1, 1895

This note contains the following endorsement: Interest is paid on within note to Jany. 24, 1894.

It is stipulated by counsel that a copy of this note just offered in evidence may be placed in the record in lieu of the original, that to be retained by Mr. Sturges to be produced if desired by court or counsel at any time. Note is as follows:

$3,000 "CHICAGO, November 14, 1893.

On demand after date we promise to pay to the order of Northwestern National Bank three thousand dollars at Chicago, Illinois. Value received.

McCORMICK CONSRUCTION CO.

No...Due.... By R. P. McCORMICK, Pres."

[Endorsed]: "Interest is paid on the within note to Jany. 24, 1894."

282 Mr. Sturges presents a stipulation filed in this cause to be copied into the record as follows;

UNITED STATES OF AMERICA, } ss.
NORTHERN DISTRICT OF ILLINOIS. }

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION.

Eugenia Crimp, Executrix, etc., *vs.* McCormick Construction Company *et al.* } *In Chancery. Gen. No. 23,174.*

In the matter of the intervening petition of the Northwestern National Bank of Chicago.

It is in the matter of said intervening petition hereby stipulated and agreed by and between said bank, Eugenia Crimp, executrix, etc., and Patrick J. Sexton, receiver, by their respective

solicitors, that under the reference of said petition made to him by said court on the fifth day of December, A. D. 1894, Elijah B. Sherman, Master in Chancery, shall hear, find and report on the claims of said bank set up in its said petition, and that for and upon the cross-demands or causes of action against said bank, set up or referred to in the answers of said receiver and of said Eugenia Crimp, executrix, etc., filed to said petition of said bank, said receiver, upon due leave of court shall cause an action at law to be brought against said bank, for the determination of the alleged liabilities of said bank thereon, which action shall be speeded to determination by the parties thereto respectively, saving to each the right to
283 due procedure and to lawful procedure in error therein, and that, until the final determination of said procedure at law, or until the further order of said Circuit Court of the United States, said bank shall be stayed in any satisfaction, out of the funds and assets of the McCormick Construction Company in the hands of said receiver, of its said claims as they may be allowed and found upon or under its said petition, to the end that if such procedure at law shall result in a final judgment against said bank, said judgment may have equitable application *pro tanto* as a set-off against said claims of said bank as they may be so allowed and found, and that if said Circuit Court of the United States shall, before the determination of said procedure at law, order any distribution to the creditors of the McCormick Construction Company from said funds and assets, there shall in that case be reserved to answer said claims of said bank a proportion of said funds and assets equitable upon the facts and circumstances of said distribution, to the end and in such wise that said bank shall not be prejudiced by said stay in its receiving ultimate satisfaction of its said claims out of said funds and assets, on the full and just scale of such distribution, in the event that said procedure at law shall result in judgment in favor of said bank. Given in triplicate on this fourth day of January, A. D. 1895.

MARCUS KAVANAGH,
Solicitor for Patrick J. Sexton, Receiver.
R. N. BAYLIES,
Solr. for Eugenia Crimp, Executrix, etc.
CHARLES M. STURGES,
2 84 Solr. for Northwestern National Bank of Chicago.

[Endorsed]: Filed May 1, 1895.

S. W. BURNHAM,
Clerk.

285 Afterwards, to wit: on the third day of May, 1895, came the complainant in said entitled cause, by her solicitors and filed in the clerk's office of said court, her exceptions to the report of E. B. Sherman, Master in Chancery, which said exceptions are in the words and figures following, to wit:

EXCEPTIONS TO MASTER'S REPORT.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS,
NORTHERN DIVISION.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Eugenia Crimp, *Complt.*,
vs.
The McCormick Construction Company *et al.*, *Defendants.*

Exceptions of Eugenia Crimp, complainant to the report and findings of E. B. Sherman, Master in Chancery.

Comes now Eugenia Crimp, complainant, by John N. Jewett and R. N. Baylies, her solicitors, and files these her exceptions to the report and findings filed herein by E. B. Sherman, Master in Chancery, to whom this cause was referred by order of this court, entered Dec. 5th, 1894, and alleges the following specific grounds of exception thereto, to wit:

First. In said report the claim of complainant is only allowed to the amount of $2,983.13 for money advanced the defendant, the
286 McCormick Construction Company when the proof showed and the master finds that the full amount of money advanced by W. G. Crimp to the McCormick Construction Company was $28,183.13 and said full amount should have been allowed.

Exceptions of Eugenia Crimp to Master's Report, filed May 3, 1895.

Second. The item of $2,983.13 is allowed to complainant as a general creditor of the McCormick Construction Company, only when the same should have been allowed and established as a preferred claim entitled to preference over all other creditors in the fund derived from the sale of the drainage contract

EUGENIA CRIMP,
Complt.

By John N. Jewett and R. N. Baylies,
Solicitors.

[Endorsed]: Filed May 3, 1895.

S. W. BURNHAM,
Clerk.

287 Afterwards, to wit: on the sixth day of May, 1895, came Ingersoll-Sergeant Drill Company, by its solicitors, and filed in the clerk's office of said court its exceptions to the master's report, which said exceptions are in the words and figures following, to wit:

EXCEPTION TO MASTER'S REPORT.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. }

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS. IN CHANCERY.

Eugenia Crimp, Executrix, etc.,
vs.
McCormick Construction Company and R. P. McCormick. } *23,174. 644.*

Exceptions of Ingersoll-SergeantDrill Co. to Master's Report, filed May 6, 1895.

The Ingersoll-Sergeant Drill Company, by William J. English, solicitor, hereby except to the report of Master E. B. Sherman in the above entitled cause, and claim that he erred therein in this, that he did not sustain the validity of the "first mortgage" of said Ingersoll-Sergeant Drill Company therein, but found that the same was not a valid first lien upon the chattel property of said McCormick Construction Company, so far as the same was included in

said "first mortgage." And that said master erred on that respect and that the same should be changed so as to provide that said "first mortgage" should be found to be a prior and valid first
288 lien before the said second mortgage therein recited upon the said chattel property of said company, and to the amount and value of the said chattel property as set forth in the evidence presented by said Ingersoll-Sergeant Drill Company.

Exceptions of Ingersoll-Sergeant Drill Co. to Master's Report, filed May 6, 1895.

THE INGERSOLL SERGEANT DRILL CO.,
By WM. J. ENGLISH,
Its Solicitor.

[Endorsed]: Filed May 6, 1895.

S. W. BURNHAM,
Clerk.

289 Afterwards, to wit: on the fifteenth day of May, 1895, came the Patrick J. Sexton, receiver in said entitled cause and filed in the clerk's office of said court, his report, which said report is in the words and figures following, to wit:

RECEIVER REPORT.

UNITED STATES DISTRICT COURT, IN AND FOR THE NORTHERN DISTRICT OF ILLINOIS.

Eugenia Crimp
vs.
McCormick Construction Company. } *Report of Receiver.*

Comes now Patrick J. Sexton, receiver in the above entitled cause, who respectfully reports to the court his receipts and expenditures as such receiver as follows, to wit:

Receiver's Report, filed May 15, 1895.

Received from Smith and Eastman, on account of sale of the plant and contract with the Drainage Board, Section 14, drainage channel.

Receiver's Report, filed May 15, 1895.

For contract and reserved percentages	$33,000.00
For plant	8,000.00
For Drainage Board	9,581.25
" " "	59.37
Unclaimed pay envelopes, said to contain	86.29
Total receipts	$50,726.91

290 EXPENDITURES.

Paid to workmen, under order of court	$10,240.21	
Detective service	9.52	
Fred S. Wheaton, expert accountant	90.00	
Chas. F. McPartlin	42.00	
Collins, Goodrich, Darrow & Vincent, for feed of mules	4.00	
N. R. Clark, taxes McCormick property	28.50	
Ezekiel Smith, expenses	12.39	
E. B. Sherman, master's fees	259.50	
		$50,726.91
Wm. M. Booth, Master's fees	$ 262.50	
O'Neil Ryan, of St. Louis, retainer in case of receiver *vs.* O'Meara	100.00	
Marcus Kavanagh as attorney for receiver	500.00	11,548.62
Balance		$39,178.29

Your receiver respectfully reports to the court, that he is entitled to a commission for his services of $2,500.00. And that his solicitor, Marcus Kavanagh, is also entitled to the further sum of $1,200.00. That there is now unexpended in his hands, of the said receipts, the sum of $39,178.29.

P. J. SEXTON,
Receiver.

By MARCUS KAVANAGH,
His Sol'r.

MARCUS KAVANAGH,
Sol'r for Receiver.

[Endorsed]: Filed May 15, 1895.

S. W. BURNHAM,
Clerk.

291 On the same day, to wit: the fifteenth day of May, in the adjourned May term of said court, 1895, in the record of proceedings thereof, in said entitled cause, before the Hon. Romanzo Bunn, District Judge, appears the following entry, to wit: Decree.

Eugenia Crimp, Executrix,
23,174 *vs.* } *In Chancery.*
McCormick Construction Company *et al.*

This cause having been heretofore by order entered December 5, 1894, referred back to E. B. Sherman, Esq., one of the Masters of this court, to take proofs and report with his findings thereon, touching certain claims against the said McCormick Construction Company theretofore filed but objected to and not allowed by the former report of said Master in said cause, and the said Master having now made his report thereon and the same having been filed, and exceptions to certain portions of said report having been filed on behalf of the complainant and of the Ingersoll-Sergeant Drill Company, a creditor of said McCormick Construction Company and no other objections or exceptions to said report having been made or filed, and this cause now, by consent and written stipulation of all the parties in interest having come on to be heard in said Master's report, and said exceptions thereto, and the court having heard and considered the same and the arguments of counsel thereon, it is now on this 15th day of May, A. D. 1895, ordered, adjudged and decreed that said exceptions be and are hereby overruled and said report in all things confirmed, and Mr.

Patrick J. Sexton, the receiver of the property and assets of
292 the said the McCormick Construction Company, having now presented to the court his report of the funds which have come to his hands as such receiver, showing that there now remains in his hands to the credit of said fund the sum of thirty-nine thousand one hundred seventy-eight dollars and twenty-nine cents ($39,178.29), whereof the sum of eight thousand ($8,000) dollars is the proceeds of certain personal property covered by certain mortgages and attachment liens, and which, according to the findings of said Master's report, is wholly applicable towards the satisfaction of said liens and certain expenses incurred in connection therewith, and said receiver now praying that due allowance may be made to him by the court out of said fund for his services here-

Decree.

in, and for compensation for services of his counsel, said report of said receiver is now allowed and confirmed, and the court doth hereby fix and allow to said receiver to be paid out of the funds in his hands in full for his own services herein, the sum of twenty-five hundred ($2,500) dollars, and for the services of his counsel the sum of seven hundred ($700) dollars in addition to the sum of five hundred ($500) dollars already paid therefor, and doth also order and direct said receiver to pay out of said funds to Mr. E. B. Sherman, Master of this court, the sum of seven hundred and fifty ($750) dollars which is allowed by the court as his fees upon the hearing and report on the order of reference of December 5, 1894.

And the court doth further order, adjudge and decree that the balance remaining in the hands of the receiver be divided, distributed and paid over by said receiver unto and among the creditors of the said McCormick Construction Company or to their respective solicitors herein upon and towards the satisfaction
293 of their several demands as heretofore ascertained and reported to this court by the master by his reports dated March 26, 1894, October 2, 1894, and April 20th, 1895, respectively, and of which a schedule in accordance with the findings of said reports is hereto annexed and made a part of this decree, with interest from the date of this decree at the rate of five per cent. per annum, together with the taxable costs herein of such of said creditors as have filed intervening petitions, to be taxed by the clerk, and added to the sums named in said schedule, the amount of which said several demands, with the interests and costs, are hereby adjudged to said creditors respectively, provided, however, that in such payment and distribution the complainant be debited with the sum of two hundred and sixty-two dollars and fifty cents ($262.50) heretofore paid by the receiver to William Booth, Esq., one of the masters of this court, as his fees upon the hearing and report on the order of reference to him of July 10, 1894, which are hereby charged and adjudged against the complainant herein. And, provided further, and it is hereby ordered by the court that the amounts payable to the Northwestern National Bank by the terms of this decree, be, until the further order of the court stayed in payment to said bank to await the determination of the cross demand of the McCormick Construction Company against said bank mentioned in and pursuant to the provisions of the stipulation in that behalf entered into of record herein between said bank and said receiver and said Eugenia Crimp, executrix, as said stipulation is recited in the special report of said E. B. Sherman, master as aforesaid, filed herein in the matter of the intervening petition of said

bank in this cause, which special report is hereby approved D
294 and in all things confirmed, and it is hereby further ordered by the court that said receiver forthwith proceed, as he shall be advised of his counsel, for a legal determination of said cross-demand against said bank in accordance with the terms of said stipulation, and it is further ordered, adjudged and decreed by the court that if, after making the several payments provided for herein, there shall remain or come into the hands of the receiver any surplus money, he shall report the same to the court, and all questions touching the disposition of the same are reserved for further consideration.

SCHEDULE.

Gross balance in hands of receiver		$39,178.29
Masters' fees	$ 750.00	
Receivers' fees	$2,500.00	
Receivers' counsel	$ 700.00	$3,950.00
		$35,228.29
Balance of which proceeds of sale of personal property is a special fund subject to liens		$8,000.00

EXPENSES CHARGED TO SPECIAL FUND.

W. A. Barker	$ 100.00	
Ingersoll-Sergeant Drill Co	162.00	
N. W. National Bank	54.	
Parker, Melcher & Ingraham	13.00	
" " "	411.50	
Moses P. Johnson Machinery Co	31.00	
Consolidated Coal Co	87.10	
		$ 858.60
Balance to lien claimants		$ 7,141.40

295 Dividend to Lien Claimants out of Special Fund.

To Ingersoll-Sergeant Drill Co	$4,171.62	
Moses P. Johnson Machinery Co	806.62	
Parker, Melcher & Ingraham	365.05	
Northwestern National Bank	1,377.97	
Consolidated Coal Co	420.14	
		$7,141.40

To unsecured Creditors.

Balance as above		$35,228.29
Deduct special fund		8,000.00
Balance for Distribution, -		$27,228.29
To Ingersoll-Sergeant Drill Co	$10,214.07	
Less	4,171.62	
		$6,042.45
Moses P. Johnson Machinery Co	$ 1,864.70	
Less	806.62	
		$1,058.08
Parker, Melcher & Ingraham	$ 843.68	
Less	365.05	
		$ 478.63
Northwestern National Bank	$ 3,185.83	
Less	1,377.97	
		$1,807.86
Consolidated Coal Co	$ 970.60	
Less	420.14	
		$ 550.46
Complainant, Eugenia Crimp, Exr., for Money advanced by Testator	$ 2,983.34	
Property Sold	740.00	
296	$ 3,723.34	
Less Master's fees paid to Wm. Booth	262.50	
		$ 3,460.84
F. Benttenmuller, Joliet		8.00
Illinois Steel Co., Chicago		565.13
W. P. Waugh, St. Louis		45.17
Henry McGurren et al		50.00
Repauno Chemical Co., Chicago		3,072.69
Atchison, Topeka & Santa Fe Ry. Co.		140.94
William Adam, Joliet, Ill		275.02
John W. Arnold, Lockport, Ill		4.50
Applegate & Sons, Louisville, Mo		15.75
Barrett Hardware Co., Joliet, Ill		65.36
Geo. D. Barnard & Co., St. Louis, Mo.		7.00
Blogg Brothers, Lockport		386.16
M. M. Buck & Co., St. Louis		6.16
Bush, Simmons & Co		107.00
Bohnstengel & Weir, Lockport		31.15

	Crane Company, Chicago	$ 276.80	Decree.
	Carson, Pirie, Scott & Co., Chicago	3.99	
	H. Channon Co.	224.34	
	Chicago & Minonk Coal & Tile Works, Minonk, Ill.	55.37	
	The Corey Car Mfg. Co., Chicago	38.27	
297	Crerar, Adams & Co., Chicago	37.02	
	W. B. Crane & Co., Chicago	144.00	
	W. P. David, Lockport	91.19	
	W. B. Douglas, Chicago	14.20	
	Dandridge & Hanger, Lockport	300.05	
	Robert Dixon, St. Louis	190.50	
	Martin Emerich Outfitting Co., Chicago	33.55	
	Gutta Percha Rubber Co., Chicago	63.84	
	B. A. Grant, Lockport	6.20	
	Elmer E. Henry & Co., Joliet	17.33	
	A. W. Harris Oil Co., Chicago	69.89	
	Howe, Brown & Co., Limited, Pittsburg	69.36	
	Heggie Brothers, Joliet	540.18	
	Humphrey & Sons, Joliet	402.90	
	C. M. Henderson & Co., Chicago	216.02	
	Hibbard, Spencer, Bartlett & Co., Chicago	282.80	
	Hooker & Colville Steam Pump Co., St. Louis	12.00	
	Illinois State Penitentiary, Joliet	261.81	
	Sherman S. Jewett & Co., Chicago	45.35	
	Kelley, Maus & Co., Chicago	25.99	
	Christian Kerrell, Lockport	3.00	
	S. D. Kimbark, Chicago	451.89	
	Town of Lockport	28.50	
	The Lockport Phœnix, Lockport	27.80	
	George M. Lynd, Lockport	3.00	
	Philip Moos, Chicago	9.75	
	McNeil, Higgins Co	1,003.47	
298	Franklin MacVeagh & Co., Chicago	737.17	
	Dr. O. W. Moon, Lockport	9.07	
	Norton & Co., Lockport		
	O'Connell & Sloan, Lockport		Petition for Appeal and Assignment of Errors of Crimp, filed May 15, 1895.
	Pease & Bell, Chicago		
	Ryan & Sullivan, Lockport		
	Sawyer, Goodman & Co., Chicago		
	Scully Steel & Iron Co., Chicago	150.84	
	Charles S. Seaver, Joliet	314.93	
	Swift & Company, Chicago	124.95	
	Joseph Stephen, Joliet	51.15	
	John Swandak, Joliet	11.05	

Decree.

Standard Oil Co., Chicago	$ 122.46
Simmons Hardware Co., St. Louis	34.50
Star Lubricating Oil Works, Cleveland	133.05
H. J. Spanknebell, Lockport	14.87
Nicholas Vogt, Lockport	20.23
J. H. Walker & Co. (Chi. Title & Trust Co.), Chicago	279.71
M. Walter, Lockport	13.89
Wolfork, Johnson & Comer, Romeoville	181.98
Wilcox Bros., Joliet	60.35
Yost Brothers, Lockport	587.43
	$26,862.18

On the same day, to wit: fifteenth day of May, 1895, came
301 Eugenia Crimp, by her solicitor, and filed in the clerk's office of said court her petition for appeal and assignment of errors, which said petition and assignment of errors are in the words and figures following, to wit:

PETITION FOR APPEAL AND ASSIGNMENT OF ERRORS.

IN THE CIRCUIT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS.

Eugenia Crimp, Executrix,
vs.
McCormick Construction Company *et al.*

PETITION FOR APPEAL.

Comes now the complainant, Eugenia Crimp, by her solicitors, John N. Jewett and R. N. Baylies, and prays an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, from the several orders and decrees heretofore entered herein as follows:

First: From the order of this court entered December 5th, 1894, overruling the exceptions of complainant to the report of Master in Chancery Wm. M. Booth and confirming said report.

Second: From the order of this court entered December 5th,

Petition for Appeal and Assignment of Errors of Crimp, filed May 15, 1895.

1864, disallowing and rejecting the claim of complainant for the sum of twenty-five thousand, two hundred ($25,200) dollars for moneys advanced to the defendant, the McCormick Construction Company, by William G. Crimp.

302 Third: From the order of this court entered December 5th, 1894, referring the claims of creditors of the defendant, the McCormick Construction Company, to Master in Chancery E. B. Sherman and directing said master not to allow the claim of complainant for moneys advanced by William G. Crimp to defendant, McCormick Construction Company, excepting such moneys as were so advanced in excess of the sum of $25,200.

Fourth: From the order of this court entered the 14th day of May, 1894, overruling the exceptions of complainant to the report of Master in Chancery E. B. Sherman.

Fifth: From the order and decree of this court entered the .... day of May, 1895, confirming the report of Master in Chancery E. B. Sherman and ordering a distribution of the funds derived from the sale of the drainage contract to other creditors of the defendant, the McCormick Construction Company, than the complainant.

Complainant attaches hereto and files herewith as a part hereof as Exhibit "A," an assignment of the errors in the rulings of the court of which she complains and from which she prays an appeal.

JOHN N. JEWETT and
R. N. BAYLIES,
Solicitors for the Complainant.

"EXHIBIT A" TO PETITION FOR APPEAL.

303 The court erred in holding:

1. That the contract set out in the report of Master in Chancery, Wm. M. Booth, did not constitute W. G. Crimp, a preferred creditor of the McCormick Construction Company for all moneys advanced said company under said contract, when said Circuit Court should have found that said Crimp was a preferred creditor of said company for all moneys so advanced as against all other creditors of said company.

Petition for Appeal and Assignment of Errors of Crimp, filed May 15, 1895.

2. In holding that W. G. Crimp, did not acquire a valid lien as collateral security to secure all moneys advanced to the McCormick Construction Company, upon the drainage contract when said circuit court should have held that said Crimp did under said contract acquire a valid lien upon said contract and that complainant is entitled to a first and prior lien upon the funds derived from the sale of the drainage contract to secure all moneys advanced said company by said Crimp.

3. In overruling the exceptions and each of the exceptions filed herein by complainant to the report filed herein by Wm. M. Booth, Master in Chancery.

4. In not sustaining the exceptions and each of the exceptions filed herein by complainant to the report filed herein by Master in Chancery, Wm. M. Booth.

304 5. In confirming the report of Wm. M. Booth, Master in Chancery filed herein.

6. In holding that W. G. Crimp, for all moneys paid or advanced by him to the McCormick Construction Company did not become a creditor of said company.

7. In holding that complainant was not entitled to prove as a preferred claim, right to priority in the fund derived from the sale of the drainage contract, all moneys advanced by Wm. G. Crimp, to the McCormick Construction Company.

8. In holding that complainant was not entitled to prove as a preferred claim with right to priority in the fund derived from the sale of the drainage contract, all moneys advanced by W. G. Crimp to the McCormick Construction Company in excess of the sum of $25,200.00.

9. The said court erred in its order entered Dec. 5th, 1894, referring said cause to Master in Chancery, E. B. Sherman in directiog said master not to allow to complainant either as a creditor or a preferred creditor the sum of $25,200.00 advanced by W. G. Crimp, to the defendant, McCormick Construction Company and to only allow to complainant as a creditor any sums to which she might prove herself entitled in addition to said sum of $25,200.00

Petition for Appeal and Assignment of Errors of Crimp, filed May 15, 1895.

10. The court erred in overruling the exceptions filed by complainant herein to the report of Master in Chancery, E. B. Sherman.

11. The court erred in confirming the report of Master in
305 Chancery, E. B. Sherman, and erred in ordering a distribution to other creditors of the funds derived from a sale of the drainage contract, and upon which complainant had a first and prior lien to secure the sum of $28,183. 13, money advanced by W. G. Crimp, under the contract involved in this action.

12. The court erred in ordering a distribution of the funds derived from a sale of the drainage contract to other creditors when it should have ordered the sum derived from said sale of the drainage contract to be first applied to the payment of the claim of $2,983.13, allowed to complainant.

R. N. BAYLIES,
Solicitor for Complainant.

[Endorsed]: Filed May 15, 1895.

S. W. BURNHAM,
Clerk.

On the same day, to-wit: the fifteenth day of May, 1895, came Ingersoll-Sergeant Drill Company by its solicitor and filed in the clerk's office of said court, its petition for appeal and assignment of errors which said petition and assignment of errors is in the words and figures following, to-wit:

CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Eugenia Crimp,
Executrix,
vs.
McCormick Construction Co., Ingersoll-Sergeant Drill Co., *et al.*

306 PETITION FOR APPEAL.

Petition and Assignment of Errors of Ingersoll-Sergeant Drill Co. filed May 15, 1895.

Comes now the petitioner respondent. The Ingersoll-Sergeant Drill Co. by its solicitor, Wm. J. English, and prays an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, from the order of this court entered May 15, 1895, overruling the exceptions of petitioner to the report of the Master in Chancery, E. B. Sherman.

WM. J. ENGLISH,
Solr. for the Ingersoll-Sergeant Drill Co.

Petitioner appends hereto and files herewith as a part hereof as Exhibit A, an assignment of the errors in the rulings of the court of which it complains and from which it prays an appeal.

WM. J. ENGLISH,
Solr. for said Petr.

EXHIBIT A. TO PETITION FOR APPEAL.

ASSIGNMENT OF ERRORS.

The court erred in holding.....in not sustaining the exceptions and overruling same filed by petitioner to the report filed herein by Master in Chancery E. B. Sherman and in confirming the report of said master in that respect.

WM. J. ENGLISH,
Solr. for said Petitioner.

THE INGERSOLL-SERGEANT DRILL CO.

[Endorsed]: Filed May 15, 1895.

S. W. BURNHAM.
Clerk.

299 On the same day, to wit: the fifteenth day of May, in the adjourned May term of said court, 1895, in the record of proceedings thereof in said entitled cause, before the Hon. Romanzo Bunn, District Judge, appears the following entry, to-wit: Record Entry.

Eugenia Crimp, Executrix,
23,174 *vs.* } *In Chancery.*
McCormick Construction Company.

Now comes the complainant by her solicitor and prays an appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the decree entered herein on this date.

The court being advised in the premises, it is ordered that said appeal be allowed upon the complainant, Eugenia Crimp, executrix, filing an appeal bond in the sum of two thousand dollars ($2,000) with security to be approved by the court.

On the same day, to-wit, the fifteenth day of May, in the adjourned May term of said court, 1895, in the record of proceedings thereof, in said entitled cause, before the Hon. Romanzo Bunn, District Judge, appears the following entry, to wit:

Eugenia Crimp, Executrix,
vs. } *In Chancery.*
McCormick Construction Company *et al.*

Now comes the Ingersoll-Sergeant Drill Company, petitioner herein, by its solicitor and prays an appeal to
States Circuit Court of Appeals for the Seventh Circuit from
300 the decree entered in the above entitled cause on this date.
The court being advised in the premises, it is ordered that said appeal be allowed without bond.

Afterwards, to wit: on the eighteenth day of May, 1895, came
307 Eugenia Crimp, as principal, and John M. L. Sexton and Charles F. Keeler as sureties and filed in the clerk's office of said court an Appeal Bond in said cause, which said Appeal Bond is in the words and figures following, to-wit:

APPEAL BOND.

Know all Men by these Presents, what we, Eugenia Crimp, as principal, and John M. L. Sexton and Charles F. Keeler as sureties are held and firmly bound unto P. J. Sexton, receiver in case of Eugenia Crimp vs. McCormick Construction Company and R. P. McCormick in the full and just sum of two thousand ($2,000.00) dollars to be paid to the said P. J. Sexton, receiver for the use and benefit of the creditors of McCormick Construction Company whose claims have been allowed by the court, certain attorney, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this 17th day of May in the year of our Lord one thousand eight hundred and ninety-five.

Whereas, lately at a session of the United States Circuit Court for the Northern District of Illinois held at Chicago, to-wit: May 15th, 1895, in a suit depending in said court between Eugenia Crimp, Excx., complainant vs. McCormick Construction Company and R. P. McCormick, defendants, and Northwestern National Bank *et al.*, intervenors, wherein a decree was rendered 308 against the said complainant, establishing the claims of creditors the McCormick Construction Company and ordering distribution of funds in hands of said receiver, and the said complainant filed in said court her petition for an appeal from said decree to the United States Circuit Court of Appeals and her assignment of errors, which having obtained and filed a copy thereof in the clerk's office of the said court to reverse the....in the aforesaid suit, and a citation directed to the said appeal was duly allowed by the court on the 15th day of May, A. D. 1895, citing and admonishing..... to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit to be holden at Chicago, on the.....day of .... 189..

Now, the condition of the above obligation is such, that if the said appellant, Eugenia Crimp, executrix, shall prosecute her appeal to effect and answer all damages and costs if she fail to make her appeal good, then the above obligation to be void, else to remain in full force and virtue.

EUGENIA CRIMP, Executrix, (Seal.)
JOHN M. L. SEXTON, (Seal.)
CHAS. F. KEELER, (Seal.)

Approved by:
WM. H. SEAMAN,
D. Judge.

(Endorsed): Filed May 18, 1895.

S. W. BURNHAM,
Clerk.

314 IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.
NORTHERN DIVISION.

Eugenia Crimp, *Executrix*,
vs.
The McCormick Construction Company, and R. P. McCormick.
} *In Chancery.* 23,174.

Testimony of Edgar Ingraham, Mr. Parker, Wm. J. English and F. S. Weigley, taken before E. B. Sherman, Master in Chancery.

315 Mr. English: I have offered this in evidence only for a particular purpose, but I will hereafter offer it in evidence generally.

EDGAR INGRAHAM, a witness called on behalf of claimant, being first duly sworn, testified as follows: T E

Direct Examination by Mr. English.

Q. I believe you have stated your connection with the Ingersoll-Sergeant Drill Company during the time of this transaction, have you not?

A. Yes, sir, I think so.

Q. Look at the mortgage now shown you and alluded to throughout as the first mortgage, and state if you have seen that before?

A. Yes, I have seen that before.

Q. What property does that include, that is, as purchased from whom?

A. This mortgage covers a lot of machinery furnished to the McCormick Construction Company by the Ingersoll-Sergeant Drill Company.

Q. Are you acquainted with the value of that property both

at the time it was delivered, and the time it was seized, and at the time it was sold by the court.

A. I am acquainted with its value at the time it was furnished the McCormick Construction Company, and up to the time I ceased to have any connection with the affairs of the McCormick
316 Construction Company and the Ingersoll-Sergeant Drill Company.

Q. That is about the time of its sale by the court, is it not?

A. Yes, sir, if I remember correctly.

Q. What was a fair cash value of that property there described at the time of its sale by the court?

A. Of the property described in this mortgage?

Q. Yes?

Q. I should consider it was worth within twenty per cent. of the value that is attached to it in this mortgage, eighty per cent. of the original value named.

Mr. Sturges: Objected to, it conveys no information to the court, and also for the reason that it is proposed to lay a foundation for a distinction between the amounts realized on the first mortgage as compared with the second mortgage, that will be required to be done in detail unless it is stipulated that the second mortgage embraced all the first mortgage did.

It is stipulated that the second mortgage contained among other things all the property described in the first mortgage.

Mr. Sturges: I also further object that the testimony is irrelevant, because what the property was worth is not material, it is what the property brought.

317 Mr. Baylies: I desire to make a general objection to all this evidence, it seems to me it is incompetent and immaterial at least until the mortgage is received in evidence.

The Master: It is understood that it will be offered; it is merely a question of the order of proof. You would better let the proofs go on with leave to strike out on final argument, all questions may be raised on final argument before the master.

Q. Were you the party, and were you familiar with the facts in regard to the making of this first mortgage?

A. Yes, sir.

Q. Look at this first mortgage, it states it is to secure $8500, according to the tenor and effect of four notes of even date herewith executed by the said grantors, and due and payable to the said grantee as follows "and then a blank." All of said notes bearing interest at the rate of seven per cent. per annum." Will you state what you know about the circumstances in regard to that blank?

Mr. Church: Objected to, he can't explain it, it must speak for itself.

Mr. English: I don't think that question is objectionable.

Mr. Church: It is immaterial and incompetent.

The Master: The master will permit the evidence to be introduced, with leave to counsel on final argument to move to strike out.

A. This mortgage was drawn to secure certain notes which
318 Mr. R. P. McCormick, the president of the McCormick Construction Company, had agreed to give the Ingersoll Sergeant Drill Company in payment of their account, and the understanding was that we would arrive at an exact amount when I could look over the books and see if there were any shortages in the claims of duplicate parts that we had shipped, and so on, and when we had got the account balanced and mutually agreed upon we were to take the exact amount and make the notes to cover it with interest at seven per cent. and the notes, if I remember correctly, were to run at 3, 6, 9 and 12 months. I think that was the arrangement that I made with McCormick. They executed the mortgage, at least I made McCormick and his secretary get on their horses and go over from the camp to the Justice of the Peace's office in Lockport about 11 o'clock they were trying to squirm out of it, and objecting to do anything at all to secure the account and I simply induced them, compelled them you might say, by tongue-lashing, to go there and do what they agreed to do, and they did so, and that is the mortgage that they acknowledged or executed, whatever you call it, before the Justice of the Peace in the township where the property was located, at Lockport.

Q. How about the notes and check thereafter given?

A. Well, I don't remember just what those were now.

Q. I mean with relation to the mortgage?

A. I think McCormick made some notes.

Q. State whether or not it was in accordance with that agreement that notes were afterward given?

319 A. Yes; I think it was. I don't remember what became of the notes?

Q To secure the mortgage?

A. Yes; I think the notes were made by McCormick and handed by him. I think a Mr. Saunders, the secretary of the Ingersoll Company who was out here. I think Mr. Saunders tried to get the whole thing fixed up and didn't succeed. What became of the notes I don't know, don't know that I ever saw them myself.

Q. Have you seen the notes, copy of the notes and check attached to the bill?

A. Yes, I saw this on my last examination here.

Q. Those were given some time later?

A. Yes, sir. Two sets of notes made by the McCormick Construction Company and signed by R. P. McCormick.

Q. You say two sets of notes, was the first set of notes these in controversy, and the second set under the second mortgage or not?

Mr. Stubblefield: I think an objection here is proper that evidence can't be introduced here, proving notes without the notes themselves, or without showing the loss of those notes or the destruction of them.

The Master: That is undoubtedly true. I will hear what the facts are about it.

Q. You did proceed, then, Mr. Ingraham, in getting a settlement on the accounts?

A. Yes, sir.

320 Q. As shown in this exhibit?

A. Yes, sir, we did.

Q. With McCormick?

A. Yes.

Q. During all that time was McCormick the general manager of the company?

A. I understood that he was in charge of the work, running the work.

Q. Look at the paper now shown you and state if you have seen that before? (Referring to paper attached to claim.)

A. I have.

Q. If you have received it, state from whom and under what circumstances?

A. This paper that I have in my hand was written out, dictated by Mr. R. P. McCormick, and signed by him in the office of Parker, Melcher & Ingraham at 100 West Washington street, and the paper was made to protect the Ingersoll-Sergeant Drill Company against seizure of their property, of the property sold by them to the McCormick Construction Company, by other creditors of the McCormick Construction Company, while the chattel mortgage was being drawn up and the account was being balanced and notes were being made and the account generally gotten, adjusted and secured by the chattel mortgage.

Mr. Baylies: I object to all this.

Mr. English: This paper is introduced in evidence as Parker, Melcher & Ingraham, Exhibit number 6.

Mr. Sturges: Objected to as incompetent, immaterial
321 and irrelevant, and no authority is shown from the company to Mr. McCormick to execute any such instrument.

Mr. Church: Same objection.

Mr. Baylies: Same objection.

Mr. Ingraham: Did yon have any conversation other than has been narrated with Mr. Crimp, in his lifetime, in regard to the claim of this company?

A. I don't know what has been narrated, I never narrated any conversation I had with him myself.

Q. I don't think there has been any.

A. I never testified to any conversation.

Q. Did you have any?

A. Yes, sir.

Mr. Baylies: Objected to as incompetent, irrelevant and immaterial.

Mr. English: I propose to show in connection with this that we should come in, in any event, ahead of the Crimp claim.

The Master: The question may be answered subject to the objection, with the right reserved to counsel for Mrs. Crimp to move to strike out.

Q. State what conversation you had with Mr. Crimp in regard to the Ingersoll-Sergeant Drill Company's claim after Mr. Crimp's connection with the company?

A. I had two conversations with Mr. Crimp in regard to the account of the Ingersoll-Sergeant Drill Company against the McCormick Construction Company, one was in the office building of the company, on section 14.

Mr. Baylies: Were you a member of that company at that time?

A. Which company?

Q. The Ingersoll-Sergeant?

A. No, sir; I was one of a firm which represented their business in Chicago, their western agency.

Q. Your firm had a claim, did it not, against the McCormick Construction Company?

A. We had a small claim.

Q. You were representing that company then, too?

A. Yes, sir.

Mr. Baylies: I object because he is incompetent as a witness to testify to conversations of a deceased party.

The Master: It may be answered subject to the objection.

A. I never met Mr. Crimp, but after repeatedly dunning Mr. McCormick to pay some money to the Ingersoll Company, I learned that McCormick had induced Mr. Crimp to invest some money in the construction company, in fact McCormick stated what arrangements he had made with Mr. Crimp, stated that Mr. Crimp was backed—

Mr. Baylies: You needn't state what McCormick said.

—by others, and hence I visited the camp in expectation of meeting Mr. Crimp and endeavoring to get a settlement of the account of the Ingersoll Company. When I reached the camp I found Mr. Crimp and Mr. McCormick in conversation, and I asked Mr. McCormick to, as soon as possible, make a settlement of the Ingersoll Company's claim against him, if he would give me any money that day. Well, he referred me to Mr. Crimp, that is, he turned to Mr. Crimp in the conversation and said, well, you see what these people want, some money, what do you say about it, or something to that effect. I don't remember just what his words were. Then Mr. Crimp said that he believed something ought to be done for the Ingersoll Company, then McCormick

produced some papers, I think it was a list of accounts due by the McCormick Construction Company, and referring to that he showed an item of several thousand dollars due the Ingersoll Company, and said they ought to have some money. And then the question came up as to what settlement would be acceptable to the Ingersoll Company. Well, I told him that the company had been waiting a long time for any money except very little, don't remember what they had had, perhaps two or three hundred dollars, something like this, and finally it was agreed that the McCormick Construction Company should pay $1,000 in cash and should make notes to cover the balance of the account. I have forgotten now whether I asked him for interest on the notes or not, but it was agreed they should pay $1,000 in cash, and should give notes to cover the balance. And when that was agreed upon I inquired of Mr. Crimp what his house address was in Chicago, and I departed.

Q. Mr. English: About what time was that?

A. It was along in the summer time, I think it must have been some time in July or August, I don't remember definitely what time it was, I haven't refreshed my memory on the subject, and I don't remember distinctly.

324 Q. Did you see Mr. Crimp after that?

A. I saw him once again, in fact, only once again, that is all, I saw his wife several times, but only saw him I think once again.

Q. Where did you see him?

A. At his house.

Q. Who was present at the conversation?

A. Mr. Crimp and yourself and myself.

Q. State the conversation that occurred at that time?

Mr. Baylies: Same objection, as immaterial, irrelevant and incompetent, and the witness not competent to testify to conversations. There is no claim here against Mr. Crimp, no claim that he gave any written agreement to pay any claim, any other agreement would be void.

A. On the occasion of my last conversation with Mr. Crimp I met Mr. English by previous appointment, we met him down near Mr. Crimp's house, he came down from one direction and I came from another. We proceeded to Mr. Crimp's residence, and I think we found him sitting out on the piazza of his house, it was a warm day I remember, and it was very pleasant outside, and I

think he was sitting outside. After some little conversation
325 on regard to the state of his health, how his disease was progressing, and a general chat, the subject of the indebtedness of the McCormick Construction Company to the Ingersoll Company was brought up, and I stated to Mr. Crimp that two or three of the officers of the Ingersoll Company had visited Chicago, and that they were very severe in their talk to me about not getting the account settled up, and I asked him whether we could expect any money, how much, if any, and what disposition would be made of the balance of the account, whether we couldn't get the thing fixed up as we had previously agreed, or not. And I also asked him whether he would endorse the notes of the McCormick Construction Company which had been previously agreed upon, I stated, in asking him that question that the Ingersoll Company were not satisfied with the simple notes of the McCormick Construction Company, but that they wanted some responsible endorser. Well, Mr. Crimp at first demurred somewhat to acceding to the request to endorse the notes. Mr. English suggested to Mr. Crimp that Mr. Crimp induce Mr. P. J. Sexton to endorse the notes. Mr. Crimp didn't seem disposed to undertake to get Mr. Sexton to endorse the notes, and then I think it was Mr. English asked him if he would object to make a general statement in regard to his financial condition, that the action of the Ingersoll Company had been delayed, owing to his having associated himself with the McCormick Construction Company, and that they were holding on to him and not to McCormick, and they would like to know what his financial condition was. Well, then he made a long statement in regard to what he owned, real estate and so on,
and what was coming to him out of contracts that he had for
326 some work down in the World's Fair grounds, and he then proceeded to state that he owned a majority of the stock in the McCormick Construction Company. We had some talk about McCormick, and he said that if McCormick didn't, I think he said, do as he ought to do, he would put him him out. He said he controlled the company, and as soon as he got able to get out and go down on the work he was going down there and would see that some things were done which he knew McCormick had neglected to do, and also some other changes would be required in the method of conducting the work he had discovered for the time he had been down there and examined the methods of operating and from what he heard outside. And then we talked over the question of getting these notes endorsed by him, and he wanted the account all settled up and the bills checked up and so on, everything in good shape, and when that was done he would endorse

the notes and we would get our check for $1,000. That is the general purport of that conversation. That is the last one I ever had with the man.

Q. About what time was that conversation?

A. You mean what day of the month?

Q. Yes, about the date?

A. I don't think, Mr. English, that I can tell you definitely now, it was some little time after I had seen Mr. Crimp down at McCormick's camp; he had been sick, quite sick in the interim, and he was a little bit better then, able to get out, I think the day we saw him there was the first day he had been out, of the house, think he so stated. I think it was along in August, fore part
327 of August, if I remember correctly.

Mr. Sturges: After this first chattel mortgage was made?

A. Yes, sir, as soon as we found that Mr. McCormick was getting somebody in that would hold the thing up we didn't want to shut him out, wanted to let him have a chance for his Whitt alley.

Mr. English: How long before that conversation was the first conversation, about how many days?

A. I don't know, Mr. English, I think it was about—well, the Ingersoll Company were continually hammering me, and it was a very disagreeable position to put me in to go down there and see a sick man and nag him, I didn't like to do it, but still I was in a position where I had to do it, but I think it was a couple of weeks, couldn't say definitely it was so long a time, any way that they kept pounding away at me and drove me to go down and pursue him in his home, to find out what he would do about it, I don't know how long it was.

The Master: Was the first conversation with Mr. Crimp after the execution of this mortgage of July 20th?

A. Yes.

Q. In that conversation do you remember whether Mr. Crimp specified what real estate he had, and his powers as an officer of the company?

Mr. Baylies: Same objections.

A. Mr. Crimp made a long statement about property he owned on the south side, he said he owned the house he lived in and he owned, I think it was, some unimproved property, considerable down below further south, if I remember correctly he
328 estimated his worth at about $50,000 clear and unincumbered, that is the idea that I have in my mind now of the conversation.

Mr. English: For what purpose did he say he was stating his financial condition?

Mr. Baylies: Same objection.

A. The reason that he told what he was worth was that I stated to him that we couldn't wait forever to get our money, and that we would have to take summary measures to collect it, and that I couldn't hold the thing off, I was disposed to hold it off because I thought that was the easiest way to get the money out of the thing, but told him I couldn't hold it off any longer, and that unless something was done, we had lost confidence in McCormick's promises entirely, didn't put any reliance in him, and unless he could come to the front we would have to do whatever we could do—do the other thing, whatever that was, the best we could.

Q. Did he state anything in regard to his property, as to his responsibility in endorsing the notes?

A. Yes, that was what his endorsement was good for, didn't want it unless he was worth money enough.

Q. Remember whether he referred to Mr. Sexton as to—

A. Yes, he did.

Q. To whom we could go to investigate as to his responsibility?

A. Yes; said Mr. Sexton would tell us what money was due from the World's Fair contracts, and Mr. Sexton was very conversant with his affairs generally, knew what property he was
329 worth, and if we wanted his statement verified you could have it done by Mr. Sexton.

Q. Remember about his statement that he was vice-president; that he was in control of the company, and that no money could be taken out except under his signature?

A. He said no money could be paid out except under his signature, unless he sanctioned it; don't know whether he said anything about being vice-president or not.

Q. What if anything did he say about taking an active interest in and control of the business of the company?

A. He said he proposed to do that. He said he did not control the company, said he had a majority of the stock in the company.

Q. Did you say anything about the rest of the stock being in his control?

A. Yes, he said that he—well, I don't remember about the rest of the stock, that I don't remember definitely now about the rest of the stock but he said he controlled the company, owned a majority of the stock; if McCormick carried out the business of the company properly all right, he could stay there; he said Mac was hot-headed, but if he did what was right he could stay, but, he says, if he don't I am going to put him out, don't propose to have the money I have got in there jeopardized by any mismanagement of Mac's, something to that effect. Don't suppose that those are exactly his words.

Q. State after that conversation whether you proceeded at the earliest possible moment to get a settlement with McCormick?

A. We did. McCormick made a great many objections, made a great fuss about nothing for some reason or other
330 which I never understood, objected to getting the account adjusted and getting it shaped up.

Q. Were these notes of September 29, 1893, and the check for $1,000 given in pursuance of that settlement?

Witness is shown Parker, Melcher & Ingraham Exhibit number 4, said exhibit including several papers, first a check for $1,000, dated September 29, 1893; a note for $9,000, dated November 14, 1893; four notes dated September 29, 1893, one of them being for $500, and the other three for $1,799.80 each, and due respectively in 60 days, 90 days, 6 months and 12 months from date. Also attached as a part of said exhibit the letter of July 12, 1893, signed by McCormick, and which has been referred to by the witness, and a telegraphic blank on which there are some memoranda.

A. Yes, sir, I believe these are the notes and the check. I see on here an acceptance by the bank of the check, which was afterwards erased because the check wasn't countersigned.

Q. When these notes and check were given what did you do with the check?

A. We sent the check over to the bank to find if there was any money in the bank to pay it with in case it was accepted.

Q. What did they do at the bank?

A. I wasn't there.

Q. Who took it over?

A. A young man named Fitch, in our employ.

331 Q. He still in your employ?
A. No.
Q. Know where he is?
A. I do not; I think he is in England, he is an Englishman; think he went home.
Q. Do you know why you didn't collect that check?
A. I do.

Mr. Sturges: Object to his stating anything outside of his personal knowledge.

Q. Do you know at the time that check was given, and the notes were given, Mr. Crimp's physical condition; I see the notes are not endorsed by him, nor is the check countersigned by him.

Mr. Baylies: Objected to as immaterial.

A. We sent down the check and the notes, the check to be countersigned by Mr. Crimp and the notes to be endorsed, as he had agreed to, and we were informed he was too sick to do it.

Mr. Baylies: I object to that.

Mr. Church: Objected to as hearsay.

Mr. English: I think it will be taken for granted, without my going on the stand, I can go if necessary, that we tried, and that I tried to see Mr. Crimp, to have this done, but that he was too sick to do this business.

The Witness: I was down there half a dozen times and asked for these same papers after they had been sent there, but did not get them, because he couldn't sign them. Mrs. Crimp told me he was too sick to sign the papers.

Mr. English: I don't think anybody will object to that fact,
332 he was too sick and unable to attend to business.

Mr. Baylies: We will admit that he didn't sign them.
Q. What, if anything, did Mr. Crimp say about signing any check for part of the amount?

Mr. Baylies: Same objection.

A. I think I have testified to that already.

Cross-Examination by Mr. Baylies.

Q. Mr. Crimp is now dead, is he not?

A. I have been so informed.

Q. You stated you were a member of the firm of Parker, Melcher & Ingraham?

A. Yes, sir.

Q. And also agent of the Ingersoll-Sergeant Drill Company?

A. Yes, sir.

Mr. Baylies: I desire to move to strike out all the testimony given by this witness relating to the conversations held between him and Mr. Crimp, for the reason that no matter referring to the relation of Mr. Crimp to the McCormick Construction Company was referred to the master, for the reason that this witness is incompetent to testify to conversations had with a party deceased, and for the general reason that the testimony is incompetent, immaterial and irrelevant to any issue in the case.

333 *Cross-Examination by Mr. Church.*

Q. Did you ever see these notes before, these particular pieces of paper that have been produced here?

A. Those that have—

Q. These five notes, yes, one for $500 and four for $1,799.80 apiece?

A. Yes, sir.

Q. When, before or after their execution?

A. What do you mean by execution?

Q. Signed?

A. Yes, if I remember correctly, those were made out in our office; I think they were made out by Mr. Fitch.

Q. You never saw them since they were signed until now, have you, until they were produced here before the master?

A. Yes, I believe I did. Think I took those in my pocket myself and went down to Mr. Crimp's house on one occasion to try and get them countersigned. I remember we sent them down once by messenger, with instructions to endeavor to get them signed and bring them back, and I think that was the time I told you they told us he was too sick to sign them. I went down there a number of times to endeavor to get those things fixed up.

Q. Do you know when, with reference to the date of those notes, they were actually signed?

A. I do not, sir. My recollection is they were made out in our office and taken down to some place where McCormick was, over in the other part of town, and I think he signed them there.

Q. That is the first adjustment of the account which had been made after the chattel mortgage of July 20th was given, was it not?

A. You mean that was the first arrival at a definite understanding of what the true balance was?

Q. Yes.

334 A. I think it was; yes, sir.

Q. Those notes and that check embraced all indebtedness outstanding at the date they were given, didn't they?

A. I couldn't say about that, sir, the fact of the matter was if you allow me to explain why I don't know, I will tell you.

Q. Go on.

A. We had a storehouse, that is the Ingersoll Company had a storehouse down there within about a mile of McCormick's camp in which we had drills and parts of channeling machines, and all that sort of thing, and McCormick's men were in the habit of going and getting what they wanted to use, parts that broke and so on, from day to day, some times two or three times a day, some times we never got a direct report from the camp or storehouse to our Chicago office. I say we never did, we would sometimes, and sometimes we wouldn't. The man in charge of the Ingersoll Company's storehouse made out a report which he sent to New York to the company, the Ingersoll Company in New York took his report, charged the goods, made out a memorandum bill which they sent to us, made out another bill which they sent to McCormick, hence it was sometimes two weeks, sometimes thirty days, and I have known it to be two months. It was a somewhat loose

335 way of doing business, but it was for the convenience of the contractors.

Q. It included then, all the outstanding indebtedness of which you had any knowledge at the time you made the adjustment.

A. Well, I presume so, we would have included it in the settlement?

Q. How much of that indebtedness represented by those five notes and that check had accrued after July 20th?

A. I couldn't tell you.

Q. Have you any idea about how much?

A. No. I presume the account would show.

Q. Look at the bill and refresh yourself about that, and tell us if you can?

A. I don't know that I could tell you.

Q. I only want to know how much of the indebtedness represented by those notes and that check had accrued after the mortgage was given?

A. I don't know as I can do that, the trouble is these receipts don't bear much relation to the delivery of the goods, for the reasons I have given, I couldn't tell you anything about that. Sometimes when certain parts were required, we would send them down from the stock we had in Chicago. We would send those down and they would telegraph up to us and we would send parts down and we would make memorandum and charge it to the Ingersoll Company.

Q. Can you not tell from the bills how much of that indebtedness accrued subsequent to July 20th?

336 A. I couldn't.

Q. Can you form any estimate of it from the bills?

A. Knowing the method of operation, I have no facts to guide my judgment on it.

Q. Are there any items included in the bills which you can say did in fact accrue subsequent to July 20th and prior to September 29th?

A. I think there are items in the bill but I couldn't point out the items, couldn't tell you which the things were, but I have no doubt in my own mind.

Q. Don't the bills exhibit the dates when material was furnished?

A. That don't cut any figure at all, don't give me any light on the subject. I know the way the thing was run, hence I can say I couldn't tell you truthfully.

Q. Would you say, Mr. Ingraham, that is, an item bore date we will say, September first, that that had furnished prior to July 20th?

A. Yes, it might very easily; and if it bore date October 1st, it might, for the reason I have given.

Q. Bills dated ahead?

A. No; bills dated away behind. It is a troublesome thing to handle the supplying of these duplicate parts for the reason that I specified.

Q. There is no doubt in your mind, Mr. Ingraham, that these five notes and this check included all indebtedness which

337 existed July 20, 1893?

A. I don't think there is.

Q. If I understand you, you have no doubt that these notes and this check did in fact include some indebtedness which accrued

subsequently to July 20th, although you are unable to say just what items?

A. Well, I don't know what I ought to say, that I have no doubt about it, to give the exact state of my mind about it.

Q. Do you know of any instance in which charges slumbered over sixty days before being——

A. No, I do not; I don't know of any specific instance.

Q. The fact, then, that this adjustment took place more than sixty days after July 20th, would render it in your mind, extremely probable that it did include indebtedness accruing after July 20th, wouldn't it?

A. It may have been so.

Q. You were furnishing goods right along?

A. I can't give it that degree of certainty, though in fact I think there was stuff down there that we never did charge.

Q. You were furnishing goods right along, were you not, at that time?

A. Yes, sir.

Q. I suppose there was not a week passed that you didn't furnish them some goods, was there?

A. Yes, I guess that is about the case of it.

Q. That is about the fact, isn't it?

338 A. Yes, sir.

Q. Furnishing them constantly?

A. Yes, right along.

Q. So there was undoubtedly some indebtedness accrued between July 20th and September 29th?

A. I think that is a very fair inference.

Q. There is some way by which the fact can be ascertained isn't there?

A. Well, I don't know, sir, I suppose if you had the man that was in charge of that storehouse he could probably tell you just about what we had to have there and what he had in stock.

Q. Did he keep his own books?

A. Oh, yes.

Q. He was in the employ of the company?

A. Yes, but he wasn't a bookkeeper, he was a mechanic and that is the reason the thing was all tangled up.

Q. He was sufficiently good bookkeeper to keep a current memorandum of the goods that he shipped out, with their dates?

A. Yes, sir.

Q. Those books are in the possession of the company, are they not?

A. I presume they are, in fact, I suppose they are down at the storehouse yet for all I know to the contrary.

Mr. Church: We shall insist that the books be produced and this interval be accounted for.

Mr. Baylies: I understand this witness don't know what the indebtedness was on the 20th of July, and the account gives
339 him no indication of what it is.

Cross-Examination by Mr. Sturges.

Q. If I understand you correctly, no notes were given at the time the first mortgage was made, that is, July 20, 1893?

A. If I remember correctly, there were not.

Q. You say two sets of notes were made between the date of the mortgage and the proceedings which are now pending in court, is that correct?

A. I believe that is correct.

Q. Were the notes which were given the 29th of September, 1893, the first set or the second set?

A. I believe they were the second set.

Q. The first set of notes has not been presented here to your attention?

A. I can't say that.

Q. Are you able to say when they were given?

A. I couldn't tell you now.

Q. Did you ever see them?

A. Yes, sir, I believe I did.

Q. Now, did the settlement of September 29, 1893, in which the notes and check of that date were given, embrace settlements of the first set of notes?

A. Will you please repeat that?

Q. Were they also in settlement of September 29, 1893, the indebtedness, and were there embraced in the notes and check of that date that has been referred to, the indebtedness represented by the first set of notes to which you referred?

340 A. Partially.

Q. The unpaid part of it was also in that settlement, was it?

A. That was my understanding of it.

Q. So that the notes and check of September 29, 1893, represented so far as you are able to arrive at it, all the indebtedness which was outstanding July 20, 1893, the date of the first chattel mortgage, and all indebtedness which had accrued up to September 29, 1893, is that correct?

A. Well, with the qualification that I have already made.

Q. So far as you are able to arrive at it?

A. Yes, sir, as I have said, this method of circumlocution book keeping has thrown a great deal of stuff beyond that date which was delivered prior to that date, how much I couldn't say.

Q. You didn't mean to leave out anything?

A. Not if I could help it.

Q. Was there carried into the settlement of September 29, 1893, sums of past due interest payable on indebtedness due before that time?

A. Not that I remember, sir. No, sir, I don't think so; don't think it was anything but clean merchandise, that I remember.

Q. Then the pre-existing indebtedness represented by the pre-existing notes having been carried in so far as it was unpaid, to the settlement of September 29, 1893, the first set of notes became immaterial. I mean they were considered as immaterial?

Mr. English: I object to that.

The Master: What became of the first set of notes, if you know?

341 A. I don't know.

Q. (Mr. Church): Were they surrendered when the new note was given?

A. If I remember correctly, when I got that mortgage made out and finally got McCormick to sign it, it was done late at night that we didn't write any more notes; it was half-past 12 or 1 o'clock. I was in Lockport and I had to go back to camp to go to bed, and he practically wore me out by his trying to put it off, and not doing what he promised to do. I don't remember whether somebody was out here from the Ingersoll Company in Chicago, and if I remember correctly Mr. McCormick and whoever it was, Mr. Saunders or whoever was here fixed up the note business between themselves at the Grand Pacific Hotel.

Mr. English: You don't know of your own knowledge that any notes were ever executed and delivered?

A. No, I don't know that I ever saw them.

Q. (Mr. Church): That is what I said, Mr. Ingraham, a little while ago, when we asked you if you had ever seen those notes, and I understood you to say you had.

A. I think I did, but I won't say for sure. I will have to qualify that.

Q. So, as a matter of fact, you can't now say that you ever did see those notes?

A. No, sir.

Q. And you don't know, as a matter of fact, whether any such notes were ever given?

342 A. No.

Q. As a further fact, Mr. Ingraham, between July 20, 1893, and September 29, 1893, considerable payments were made on account, were they not, by the McCormick Company?

A. I don't remember whether there were or not. I know we got a little money out of McCormick for some purchases what we sold him; he made a solemn promise that he would pay for them inside of thirty days.

Mr. English: That is Parker, Melcher & Ingraham?

A. Yes. He had no credit and he wanted some things that he had to have, and we sold him some stuff that we had to pay for in thirty days, and he paid for them.

Q. Referring to the one which you have filed here, I call your attention to various entries under the head of credits—there appears to be no year stated there; what year is that? It should be 1893, should it?

A. That I don't know. My impression is there is an item that looks like printing, and the first item under the head of credits, that represents freight—something we had agreed to deliver—and the goods were shipped down to him and he paid for them, and we gave him credit for freight. The second item I have no recollection of at all.

Q. I wasn't asking you as to the correctness of the items. I was only asking if the year was 1893?

A. Well, I can't tell you that. I think it was; don't think he got his work started there before October or November, 1892; so I think that is 1893.

343 Mr. Sturges:

Q. According to your acquaintance with the business, the way it was transacted, what is your best recollection and impression as to whether there were, as you first stated, two sets of notes?

A. Well, I thought at first that I had seen the notes. I think it was Mr. Chapin who was out there, the then president of the Ingersoll Company, and my recollection was that he got notes from McCormick, got him to sign notes, and that I had seen them; that he left them in the office; but as I remember the circumstances I don't remember that I ever did see them, and when I come to consider whether they ever made any or not, I don't know that I can tell you.

Q. But you do know that the settlement of September 29, 1893, embraced the unpaid amounts of any first set of notes, if such first set was made?

A. Yes, sir, I know that.

Q. And you are not able, then, to give any information or details with regard to any notes corresponding with the notes imperfectly described in the first chattel mortgage?

A. Well, I don't know, Mr. Sturges. If I had time to think it over a little I might probably get some more recollection in regard to it.

Q. You do not know?

A. I do not know. I don't know but I could; I had it in hand myself, but Mr. Chapin was the man who was here, and I was working in harmony with him and under his orders.

344 A. You had to do considerably or largely with the making of the first chattel mortgage?

A. Yes, sir. Mr. Chapin, who, I think, was the man who was here, is a lawyer himself, and I suppose he—and I don't know whether he drew them up or not—I don't remember. At all events it was handed to him to look at before it was executed—that mortgage, I mean; but the notes, I don't believe I can tell you.

Q. You knew as much about it at that time as anybody?

A. Guess I knew more than anybody.

Q. I would ask you whether you are familiar with the description of the property embraced in the second chattel mortgage?

A. Yes, sir.

Q. Are you able to give any information as to the fair cash value of the property embraced in the second chattel mortgage?

A. Do you mean the entire—

Q. Yes, sir.

A. It comprised everything that was on the job; I suppose it was worth—

Q. I don't ask you what it was worth. Would your estimate of its cash value at the date this chattel mortgage was made—percentage of its cash value—be the same as with regard to that which you stated in respect to the first mortgage?

A. It would to such portion of it as I included in the estimate I made on the first mortgage; most certainly don't think it was worth any less then.

Q. How with regard to the other portions which you included in the second mortgage, and were not included in the first?

345 A. Well, you know, mules and horses and camp buildings and so on are not worth much?

Q. With regard to the other machinery?

A. Second-hand engines and all that stuff.

Q. With regard to the other machinery?

A. The trouble with it was it wasn't adapted to the work McCormick bought engines and boilers that weren't suited to do the work down there.

Q. Are you able to make any estimate in regard to—

A. To the machinery portion?

Q. Yes, sir.

A. Well, I can estimate on two boilers.

Q. No, I mean as a whole?

A. Don't know that I can.

Re-Direct Examination.

Q. You are not connected with the Ingersoll-Sergeant Drill Company, and haven't been for some time?

A. No, sir.

Q. May it not have been a fact about those first four notes that you mentioned, that they were given in accordance with the first chattel mortgage mentioned, but held in abeyance until there was an exact settlement of the amount that was due and owing from the McCormick Construction Company, and during that time that these other amounts running up and these delays you mentioned in getting a settlement, that finally the amount of subsequent purchases were included and that the September 29 notes were 346 then given for that amount then due September 29?

Mr. Sturges: I object to that as irrelevant and hypothetical and immaterial.

The master: You may answer if you are able.

A. It is impossible.

Q. Now, Mr. Ingraham, so as to save any question about the indefinite nature of the value of the goods, I see there are only a few articles there, I wish you would state the cash value—fair cash market value of the goods mentioned in that first chattel mortgage at the time of the sale in court.

Mr. Sturges: I object to that for the same reasons which have been stated before.

A. There were four channeling machines, the first two were sold to the company at $1,800 each, according to my best recollec-

ion there were two others described in the mortgage which had been upon another section in use for just 30 days. We sold those to McCormick at a reduced price, I think $1,500 each. I estimate that the total fair cash value of the property included in the first chattel mortgage at the time it was sold under order of court, was $6,520, I have gone over the various items.

Adjourned to Saturday, January 5 at 2 o'clock P. M.

JANUARY 7, 1895.

347 Met pursuant to adjournment.

Present: Messrs. English and Weigley.

Edgar Ingraham recalled for cross-examination by Mr. Weigley.

Q. Mr. Ingraham, do you remember the occasion in the office of Weigley, Bulkley & Gray, of the execution by the McCormick Construction Company, through its President, R. P. McCormick, of what is known as the second mortgage, that is, the mortgage of the several parties?

A. Yes, sir.

Q. Do you remember whether Mr. English, counsel for the Ingersoll-Sergeant Drill Company, was present at any time during that proceeding?

A. I don't think he was present.

Q. Do you remember whether he was consulted in reference to it?

A. Yes.

Q. By whom?

A. If I remember correctly I called up Mr. English on the telephone, and had a conversation with him over the giving of the second chattel mortgage.

Q. Is it not a fact that you asked him for authority to include his client, the Ingersoll-Sergeant Drill Company in that mortgage?

A. Yes, sir, I believe that was part of the conversation.

Q. Did he give you such authority?

348 A. Yes, sir.

Q. Did you talk with him on that subject subsequently?

A. I believe I did.

Q. Did he then confirm that authority?

A. He did. I believe also that Weigley, Bulkley & Gray

sent a written communication to Mr. English on that subject through one of their clerks.

Q. You didn't carry it yourself, or read it?

A. No, sir.

Q. Mr. Ingraham, who were the agents of the Ingersoll-Sergeant Drill Company in Chicago, at that time:

A. Parker, Melcher & Ingraham.

Q. Parker, Melcher & Ingraham was a corporation was it not?

A. Yes, sir.

Q. And you were one of the officers of that corporation, were you not?

A. Yes, sir, the vice-president.

Q. Had been taking a very active part, had you not, in the Drainage Canal business?

A. Yes, sir.

Q. You have testified in reference to the conversations had with Mr. Crimp during his life-time. At the time you had those conversations, you were simply an officer of Parker, Melcher, Ingraham, were you not?

A. That is all.

Q. Were you at that time, personally interested in the claims
349 concerning which you talked, outside of your interest as an officer of the corporation?

A. No, sir.

Q. And were you at the time this second mortgage was executed personally interested farther than that?

A. No, sir.

Q. And as an officer of Parker, Melcher & Ingraham?

A. No, sir.

Q. Would it have made any difference to you at the time of these conversations with Mr. Crimp which you have detailed in your evidence, whether any portion of the amount in controversy between the Ingersoll-Sergeant Drill Company and Parker, Melcher & Ingraham respectively, and the McCormick Construction Company had been realized?

A. It would simply have made the difference of reflecting, perhaps some what upon the method in which we had followed up the collection of this account of the Ingersoll-Sergeant Drill Company.

Q. You had no interest, did you, yourself in the proceeds of those?

A. No, sir.

Q. Nothing whatever?

A. No, sir.

Q. Pecuniary interest?

A. No, sir.

Q. Have you stated fully, Mr. Ingraham, all the conversation which you had with Mr. Crimp, as far as you remember it?

350 A. Well, the two conversations that I have rehearsed with Mr. Crimp, were lengthy and I don't suppose that I have given the full conversation in either case.

Q. Do you recall anything additional to what you have testified already, if so, state it?

A. I recall, on the occasion of my first conversation with Mr. Crimp, that I stated, in very emphatic terms, that unless some definite and satisfactory settlement was arrived at, the Ingersoll Company would be forced to take summary measures to protect their interests.

Q. What did he say?

A. Well, tho substance of what he said was that after waiting nearly twelve months for a settlement, it would seem that the Ingersoll Company ought to be able to stand it a little longer, or something to that effect.

Q. Refer to the second conversation, do you remember anything in addition to what you have already testified, as to that conversation?

A. That conversation, as nearly as I can recall it, was substantially as I have already testified, but it may be that I haven't made sufficiently clear in my previous testimony, the fact that this interview with Mr. Crimp was the culmination of weeks and months of effort to effect a settlement of the McCormick account, and that therefore I made very clear to Mr. Crimp's mind the fact that unless some satisfactory settlement was arrived at, necessarily the directors of the Ingersoll Company would proceed to extreme measures to collect the account, that their patience was exhausted, that they could only lose the money in any event, and that as a

351 last resort they would do whatever was open for them to do to protect themselves.

Q. What reply did he make to that?

A. Well, he repeated some of the objections that McCormick had previously made to me in regard to their being delays occasionally in getting supplies for the machinery, and stated that that was one of the reasons why the matter hadn't been settled. He also said, in similar terms to those he had used on the first interview, that having waited so long, the Ingersoll Company might wait a little longer.

Q. Did he say anything to you on that occasion as to his own

managership of that business, as to whether he, himself, would look after these matters and see to the payment of these claims?

A. He did.

Q. What did he say?

A. Well, he said that aside from these small objections which McCormick had raised about the supplying of parts as promptly as he wished, there was no objection to the settlement of the account. He said that this account of the Ingersoll Company had been included in a schedule of the indebtedness due by the McCormick Company to its various creditors at the time that McCormick endeavored to get him to invest some money in the stock of the company; that this was one of the most pressing claims and he thoroughly understood the amount of the bill when he put his money into it, and the machinery was there represented by
352 the claim, and he saw no reason why it ought not to be paid and why it should not be paid, and he would see that it was paid.

Q. Did he ask you to forbear taking any steps to prosecute the claim?

A. He did.

Mr. Baylies: Not being present at this examination, it is stipulated that all testimony may be considered as objected to by him.

Re-Direct Examination.

Q. You were asked about the making of the second mortgage, and my connection with it, do you remember of receiving from me a consent or permission for the execution of the second mortgage?

A. I do.

Q. Without waiving any rights under the first?

Mr. Weigley: I object; it is in writing and speaks for itself. Witness don't know whether he waived any rights or not.

Q. What were the contents of that, as far as you remember?

Mr. Weigley: Objected to.

A. I never saw it.

The Master: do you know where that writing is?

A. No, sir.

Mr. English: Who took it from you?

A. I don't think I ever had it. I think one of Mr. Weigley's lawyers went over to your office and got it and brought it back again. That is what you said you were going to do, Mr.
353 Weigley, and I presume you did it.

The Master: Of course oral testimony as to the contents of a written instrument is not permissible unless it is shown that it is lost or mislaid and can't be produced, but the testimony will be admitted with leave to strike out unless it shall be shown that the instrument can't be found.

Q. Do you remember the contents of that paper?

A. My recollection is that Mr. Weighley stated to me that he would draw up a form of consent and send it to Mr. English, get his signature to it and retain it on file in his office, consent to the execution of the second mortgage.

The Master: The question is do you know and can you state the contents of this paper?

A. No, sir; I never saw it.

Mr. English: You were asked about my connection with the making of the second mortgage; state whether or not you know that I declined to have anything to do with the making of the second mortgage?

A. Mr. Johnson, of the Moses P. Johnson Machinery Company of St. Louis, stated to me—

Mr. Weigley: Object, and move that it be stricken out.

Q. Were you present in my office with Mr. Johnson and Mr. McCormick when I refused to have anything to do with the execution of the second mortgage, on the ground that it might complicate me with my lien under the first mortgage, that I didn't wish
354 to have any rights of my client under the first mortgage complicated in that way; and that Mr. Johnson or Mr. McCormick should go elsewhere and have the second mortgage made?

Mr. Weigley: Object.

A. I think it was Mr. Parker that was there. I don't think I was there. I think Mr. Parker went there with Mr. Johnson.

Re-cross Examination.

Q. At the time this question of the consent to the second mortgage was discussed, isn't it a fact, Mr. Ingraham, that Mr. Weigley suggested to Mr. McCormick and to all of you, that that consent should be gotten so as to prevent any of McCormick's creditors from prosecuting him under the statute?

A. Yes, sir; that is the fact. I didn't know the consent had to be obtained, but you stated that it had to be obtained and that you would get a written consent, and asked me to get Mr. English to say "yes" over the telephone—verbally.

Adjourned to Friday, January 11, 1895, at 2 o'clock, P. M.

355 February 4, 1894.

Met pursuant to notice.

Present: Mr. W. J. English, solicitor for Ingersoll-Sergeant Drill Company.

Mr. PARKER: While I was on the witness stand a few days ago I was asked to give the value of the machinery, etc., covered by the mortgage, which I was not then able to do, but which I can now give. I value the articles enumerated in the mortgage at approximately what they were worth at the time of the sale by the court.

2–3¼ Sergeant Tripods complete, with weights, $30 each.

3–3¼ inch Ingersoll Tripods legs, with bands and set-screws, $5 each.

4 sets 3¼ Ingersoll Tripod weights, $24.

1–3¼ E2 steam-chest, complete, $8.

6–E24 Sergeant pawls, $6.

2–7 inch stiff back boiler track channelers, with all track tools, scrapers, steels to 13 foot 6 inches, pumps, suction-hose and pipe, those two are worth $1,500 each.

2–F2 Ingersoll drills complete, with tripods, but no weights, $450 for the two.

1 sand pump, fifty cents.

6–F2 tripod weights, $12.

1–F2 rotating ratchet, $3.
1–E24 3¼ Sergeant auxiliary valve, $2.
2–E24 standard and nuts, $1 each.
2–E24 Bushings, $2.

356 6–F2 pawls, $6.
6–F2 pawl springs, 30 cents.
50 feet of extra portable sectional track for channelers, $125.
1–E24 shell, $5.
½ E24 steam front-head, $3.
1–E24 rotating ratchet, $3.
2–7 inch still-back second-hand boiler track channelers with all track tools, scrapers, steel to 13 foot 6, pumps, suction hose and pipe, $1,350 each. $2,700 for the two.
2 steels, 5 inches wide, 108 inches long, $21.
2 steels, 5 inches wide, 126 inches long, $21.
2 steels, 6 inches wide, 108 inches long, $21.
3 steels, 6 inches wide, 126 inches long, $21.
12–F2 cylinder buffers, $3.
12–F2 valve buffers, $3.
6–F2 U bolts and nuts, $4.
6–U bolts, 30 cents.
1 swage, 1 spreader, $4 for the two.
One lot channeler and drill duplicating parts and supplies, this would be a very hard item to put a price on without seeing them, and would depend on what the lot consisted of.

March 6, 1895.

357 Met pursuant to agreement, present as before.

WILLIAM J. ENGLISH, being first duly sworn, testified as follows:

Mc
tio. I will state that I signed a statement to the best of my knowledge and recollection for the Ingersoll-Sergeant Drill Company in which we consented to the execution or the giving of the second mortgage in this case without waiver of our rights under the first, and that I understood was taken over to the office of Weigley, Bulkley & Gray, and I have made a search in their papers with Mr. Bulkley, one of the partners, for it, and could not find it.

Mr. Sturges: In behalf of the second mortgage I would first except to the relevancy of that statement or evidence, and then, if that should be overruled, I would ask Mr. English, secondly, another question.

Mr. Weigley: I will also join in the objection, and would like to ask Mr. English a question.

Q. Mr. English, is it not a fact, if such a paper was given, that the only purpose of giving the paper was to *save* McCormick from violation of the statute prohibiting the conveying of property of encumbered personal property.

A. I think that was the reason it was asked for.

Q. Is it not a fact that the paper itself did not contemplate any effect upon the validity of either mortgage?

358 A. I think so.

Q. And that it was solely for the purpose of avoiding a technical construction of the statute prohibiting the conveyance of mortgaged property?

A. It was, I presume, for that purpose, and also, on my part in giving it, not to waive the lien of the first mortgage.

Q. (Mr. Sturges): That paper was not made to give the first mortgage any validity that it would have had without it. It wasn't made to corroborate the first mortgage and give it strength it wouldn't have had otherwise?

A. It would be hard for me to tell what purpose was in the mind of Mr. Weigley in his office, and I in my office.

Q. It was intended then to leave both mortgages upon their merits—upon their legal merits, as they stood of record, or would stand when they were recorded?

(No answer.)

Q. Well, I will ask another question. Was it intended by that instrument to incorporate in either mortgage any provision which did not exist in their face?

A. I am sure it is rather difficult for me to swear to intentions in this case where Mr. Weigley was in his office and I was in mine, except so far as the papers themselves would show, or any correspondence with relation to it.

The Master: Will you give, as nearly as you are able, the contents of that instrument?

359 A. My remembrance is that Mr. Bulkley either sent over a note or verbal request, or possibly telephoned, asking consent

of the first mortgagees to the making of the second mortgage, and that I did give a writing in behalf of the first mortgagees, consenting to the making of the second mortgage without any waiver of the rights under the first.

Mr. Weigley: Were you present in the office of Weigley, Bulkley & Gray when the second mortgage was executed?

A. I think not.

Q. Were you present when it was prepared?

A. I think not.

Q. Were you present at the consultation at which it was arranged to be prepared?

A. I think not.

Q. Are you sure of that?

A. I am pretty sure of that.

Q. Is it not a fact that you knew that the claim of the Ingersoll-Sergeant Drill Company was to be included in that second mortgage?

A. Yes, I did.

Q. Another fact, that you consented to have it so on its behalf?

A. I will say, I can't answer that yes or no, without explanation; I will say this, that I was aware of the intention to make the second mortgage, and that I expressly refused myself to make the second mortgage, on the ground that it might perhaps affect 360 my rights or that of my parties under the first mortgage, and that I wished to do nothing which would affect their rights, and I so stated to the parties, and I therefore declined to have anything to do with the making of the second mortgage, and recommended them to go to Mr. Weigley.

So, I understand, Mr. English, that you, in this proceeding, renounce all claim on behalf of the Ingersoll-Sergeant Drill Company under the second mortgage.

A. No, we claim our rights under it.

Q. Claim your rights under it?

A. Yes.

Q. Is it not a fact that you knew and adopted it at the time it was executed?

A. I knew it was intended to make such a mortgage; am not sure that I knew absolutely that it was made at that time; I knew probably soon after that.

Q. Did you object to including the claim of the Ingersoll-Sergeant Drill Company in that mortgage?

A. Not at all.

Q. Did you not consent to its being included? I do not [illegible] you whether you waived your rights under the first mortgage, but whether you didn't consent to its being included in this one?

A. I entered no consent.

Q. I do not mean in writing, I mean whether you in fact consented?

A. No, I don't think it formally came in that shape at all.

Q. Did not Mr. Parker or Mr. Ingraham, or both of them,
361 represent your company in that conference?

A. I wasn't present at the conference, so I can't absolutely say whether they did represent it or not.

Q. Wasn't it understood between you and them that they should?

A. I can't say it was.

Q. Can you say that it was not?

A. No.

March 6, 1895.

F. S. WEIGLEY, being first duly sworn, testified as follows:

There was a consent and it was in writing, given by Mr. English on behalf of the Ingersoll-Sergeant Drill Company to McCormick to execute the mortgage on the property in question, that consent was procured at my suggestion, McCormick, although not my client, was executing security for my client, and I regarded it as my duty to him not to permit him to do an act that might subject him to some trouble thereafter, and I said to him that technically, under the statute, there being a mortgage out, he would be liable, and that we should procure for him the consent of the Ingersoll-Sergeant Drill Company, or its counsel in Chicago, to the execution of this mortgage. I procured it, or caused it to be procured; its only purpose was to avoid the statute prohibiting the conveyance of personal property that is encumbered; to avoid the technical construction of that statute. Had no relation in
362 any sense to the validity of the mortgages or their priority. It was purely for the protection of McCormick himself, and I thought it was my duty to protect him.

Q. (Mr. Sturges): Out of the abundant caution, so that he should not come within the personal liability of the statute?

A. That is it, because I remember stating to Mr. McCormick that while of course the Ingersoll-Sergeant Drill Company being in the second mortgage would not take advantage of it, that any citizen who had any grievance against him might.

Q. It was an offense against the people of the State of Illinois?

A. Yes.

NORTHERN DISTRICT OF ILLINOIS, } ss.
NORTHERN DIVISION. }

I, S. W. Burnham, clerk of the Circuit court of the United States, for said Northern District of Illinois, do hereby certify the above and foregoing to be true and correct copies of (the testimony of Edgar Ingraham, Parker, Wm. J. English and F. S. Weigley) filed in said court on the first day of May, A. D. 1895, in the cause wherein Eugenia Crimp, executrix, etc., is the complainant, and the McCormick Construction Company *et al.* are the defendants, as the same appears from the original thereof now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 21st day of June, A. D. 1895.

S. W. BURNHAM,
Clerk.

[SEAL.]

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS, } ss.
NORTHERN DIVISION.

To McCormick Construction Company, R. P. McCormick, Northwestern National Bank, Consolidated Coal Company, Parker,
312 *Melchor & Ingraham, Ingersoll-Sergeant Drill Company, Crane Company, Moses P. Johnson Machinery Company, Henry McGurran, McNeill, Higgins & Co., Gutta Percha & Rubber Company, W. B. Crane Company, Bell & Lea Coal Company, Howe, Brown & Company, Kelly, Maus & Company, Simons Hardware Company, Crerar, Adams & Company, C. M. Henderson & Company, Franklin McVeigh & Company, Equitable Trust Company, S. D. Kimbark, Sherman S. Jewett, S. W. Harris Oil Company, Hibbard, Spencer, Bartlett & Company, Charles S. Seever, William Adam, The Barrette Hardware Company of Joliet, Illinois State Penitentiary, Goodman-Sawyer Company, Swift & Company and Haggis Brothers, Greeting:*

Citation. You are hereby cited and admonished to appear at the United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago on the sixth day of July, 1895, pursuant to an appeal granted to the complainant upon a petition for appeal filed in the clerk's office of the Circuit court of the United States, for the Northern District of Illinois, wherein Eugenia Crimp, executrix, is complainant, and you, the above named parties and persons, are defendants and intervenors; to show cause if any there be, why the decree and orders and rulings complained of in said petition for an appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Hon. JAS. G. JENKINS, U. S. Circuit Judge, this 11th day of June, A. D. 1895.

313 Due service of the within and foregoing citation, hereby acknowledged this 11th day of June, A. D. 1895.

TENNEY, MCCONNELL & COFFEEN,
COLLINS, GOODRICH, DARROW & VINCENT,
AND A. BARTON STRATTON,
Atty's for
Crane Co.
Gutta Percha & Rubber Mfg. Co.
Scully Steel & Iron Co.
W. B. Crane & Co.
Bell & Lea Coal Co.
Howe, Brown & Co.
Kelly, Maus & Co.
Simmons Hardware Co.
Crerar, Adams & Co.
C. M. Henderson & Co.
Franklin McVeagh & Co.
Equitable Trust Co.
S. D. Kimbark.
Sherman S. Jewett,
A. W. Harris Oil Co.
Hibbard, Spencer, Bartlett & Co.
Charles Seever.
Wm. Adam.
Barrett Hdw. Co.
Ill. State Penitentiary.
Goodman Sawyer Co.
Swift & Co.
Haggie Bros.

WEIGLEY & EASTMAN,
for Moses P. Johnson Mchy. Co. and Parker, Melcher & Ingraham.
THORNTON & CHANCELLOR,
Attorneys for Repauno Chemical Company.
CHARLES M. STURGES,
Solr. for Northwestern National Bank.
WM. J. ENGLISH,
Solr. for Ingersoll-Sergeant Drill Co.
HAMLINE, SCOTT & LORD,
Solrs. for Henry McGurran.
COLLINS, GOODRICH, DARROW & VINCENT, Per BRADLEY,
for Consolidated Coal Co.

Received a copy of this citation left at my office June 7, 1895.
W. D. WASHBURN, Solr. for McCormick Construction Co. and R. P. McCormick.

NORTHERN DISTRICT OF ILLINOIS, } ss.
NORTHERN DIVISION. }

311 I, S. W. Burnham, Clerk of the Circuit court of the United States for said Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record made in accordance with a Praecipe for Transcript of Record filed May twentieth, 1895, in said court in the cause, wherein Eugenia Crimp, executrix, is complainant, the McCormick Construction Company and R. P. McCormick are defendants as the same appears from the records and files of said court now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district this 12th day of June, A. D. 1895.

S. W. BURNHAM,
Clerk.

[SEAL.]

Eugenia Crimp, *Appellant,* vs. McCormick Construction Company *et al.*, *Appellees.*	In United States Circuit Court of Appeals for the 7th Circuit.

STIPULATION.

For the purpose of this appeal, and to simplify and abbreviate the printed record herein, it is stipulated and admitted by the appellants that the amount of each and every claim of the creditors of the McCormick Construction Company, as set forth in detail in the schedule of the decree of the Circuit court of May 15th, 1895, is correct and just, and fully supported by the evidence before the court, and that no question is to be made as to the amount or validity of any of said claims, as a valid, subsisting indebtedness of said McCormick Construction Company, to the full amount thereof, as set forth and adjudged to said creditors respectively in said decree.

And upon said Appeal, the Appellant, Eugenia Crimp, will insist upon the following propositions only, but may present the same in any form justified by her assignment of errors, to wit:

1st. That the court erred in holding that W. G. Crimp did not become a preferred creditor of the McCormick Construction Co., under the contract referred to in the Bill of Complaint as Exhibit "A" and set out in the report of Master of Chancery William M. Booth to the full amount of all moneys paid or advanced by him to said Company, with a right to a preferential lien to secure the same upon the drainage contract, and the funds derived by the receiver from the sale of said contract, as against each and all the other creditors of said company, when it should have been held that he did become a preferred creditor of said company for the full amount so advanced with the right to full payment out of said fund as against all other creditors of said company.

2nd. That the Court erred in holding that W. G. Crimp did not become either a preferred or general Creditor of the McCormick Construction Company under the contract referred to in the Bill of Complaint as Exhibit "A," and set out in the Report of Master in Chancery, William M. Booth, to the full amount of all moneys paid or advanced to said Company by him, when it should have held that he did become such preferred or general Creditor.

And in consideration of the foregoing stipulation it is further stipulated and agreed, that only the parts of the record in this case, hereinafter designated, shall be printed, and the Complainant's case on appeal, and appeal of Ingersoll-Sergeant Drill Company, may be heard on the parts so printed, to wit:

1. Original Bill of Complaint, Record pp. 1 to 19, inclusive, and Exhibit "A" thereto.

2. Order of Court, p. 25 and 26 Record.

3. Answer of Defendant, p. 26 to 53 Record, omitting Affidavit, p. 53.

4. Intervening Petition Consolidated Coal Co., 63 to 66, Record.

5. Receiver's Report, p. 68 to 75 Record, omitting description of personal property, 69, 70 and 71.

6. Order of Court, p. 76 to 80, Record.

7. Amended and Supplemental Bill, p. 81 to 84.

8. Answer of Parker Melchor and Ingraham, p. 85 to 90, omitting Exhibits attached to said answer.

9. Intervening Petition North Western National Bank, 99 to 109.

10. Receiver's Report, 111 and 112.

11. Intervening Petition of McNeil, Higgins & Co., 118 to 126, omitting description of personal property.

12. Answer of Complainant to Intervening Petition Northwestern National Bank, 132 to 139.

13. Replication Northwestern National Bank, p. 155 and 156.

13½. Answer of Repano Chemical Company to Amended Bill of Complaint, p. 149 to 154.

14. Answer of Complainant to Intervening Petition of Consolidated Coal Company, p. 158 and 159.

15. Answer of Complainant to Intervening Petition of McNeil, Higgins & Co., 160 and 161.

16. Intervening Petition, Parker, Melchor and Ingraham, 162 to 170.

17. Answer of Ingersoll-Sergeant Drill Co., 179 to 184, omitting exhibits.

18. Answer of Complainant to Intervening Petition Parker, Melchor and Ingraham, 196 to 199.

19. Petition of Intervention of Crane & Co., and others, 200 to 205.

20. Answer to Petition of Crane & Co., 206 to 208.

21. Order of Reference to Wm. M. Booth, p. 217.

22. Report of Master in Chancery, Wm. M. Booth, 218 to 239.

23. Replication to Answer of Defendants, 240 to 241.

24. Exceptions of Complainant to Report of Master in Chancery Wm. M. Booth, 241 to 243.

25. Order of December 5th, 1894, commencing at bottom of page 245, ending on page 249.

26. Order of December 5th, 1894, page 250.

27. Report of Master in Chancery E. B. Sherman, p. 251 to 275.

28. Master's Report, p. 276 to 284.

29. Exceptions of Complainant to Report of Master Sherman, 285 to 286.

30. Exceptions Ingersoll–Sergeant Drill Co., 287, 288.

31. Receiver's Report, 289, 290.

32. Order and Decree, 291 to 298.

33. Complainant's Petition for Appeal and Assignment of Errors, p. 301 to 305.

34. Petition for Appeal and Assignment of Errors, of Ingersoll–Sergeant Drill Co., p. 305 to 306.

35. Orders of Court allowing Appeals, p. 299–300.

36. Complainant's Appeal Bond, 307, 308.

37. All the Evidence in the Record relating to the claim for priority of the Ingersoll–Sergeant Drill Company under the so-called first Mortgage, to wit: all of the testimony of Edgar Ingraham, William A. Parker, William J. English, and Frank S. Weigley, with the so-called first and second mortgages and the evidences of indebtedness claimed to be secured thereby.

38. This stipulation.

WM. J. ENGLISH,
Solr. for Ingersoll-Sergeant Drill Co.

R. N. BAYLIES,
Solr. for Eugenia Crimp, Appellant.

CHARLES M. STURGES,
Solr. for Northwestern National Bank.

WEIGLEY & EASTMAN,
For Parker Melcher & Ingraham,
Moses P. Johnson Mchy Co.

WILLIAM E. CHURCH,
Of Counsel.

COLLINS, GOODRICH, DARROW & VINCENT,
A. B. STRATTON, and
TENNEY, MCCONNELL & COFFEEN,
Attys. for McVeagh & Co., Crane Co. *et al.*,
as per intervening pet.

THORNTON & CHANCELLOR,
Solrs. for Repauno Chem. Co.

HAMLINE, SCOTT & LORD,
Solrs. for McGurren & Ryan.

I understand that R. P. McCormick and the McCormick Construction Company, formerly represented by me as one of their counsel in this case, have abandoned this case.

July 8/95. W. D. WASHBURN.

United States Circuit Court of Appeals for 7th Circuit. Eugenia Crimp, Appellant, *vs.* McCormick Construction Co. *et al.*, Appellees. Stipulation for Printing Record.

MONDAY, October 7, 1895.

Court met pursuant to adjournment.

PRESENT:

Hon. William A. Woods, Circuit Judge,
Hon. James G. Jenkins, Circuit Judge,
Hon. John W. Showalter, Circuit Judge.

Eugenia Crimp, Executrix, etc., *Appellant*,
vs.
McCormick Construction Company *et al.*
No. 251.

It is ordered by the court that this cause be and the same is hereby set down for hearing October 10, 1895.

THURSDAY, October 10, 1895.

Court met pursuant to adjournment.

PRESENT:

Hon. William A. Woods, Circuit Judge,
Hon. James G. Jenkins, Circuit Judge,
Hon. John W. Showalter, Circuit Judge.

Eugenia Crimp, Executrix, etc., *Appellant*,
vs.
McCormick Construction Company *et al.*
No. 251.

It is ordered by the court that the appeal of the Ingersoll-Sergeant Drill Company in the above entitled cause be, and the same is hereby stayed, until further orders of this court and that the hearing of this cause proceed in the matter of the appeal of Eugenia Crimp, Executrix, etc.

Eugenia Crimp, Executrix, etc., *Appellant*,
vs.
McCormick Construction Company *et al.*
No. 251.

Now this day came the parties by their counsel, and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. John N. Jewett and Mr. R. N. Baylies, counsel for appellant, Eugenia Crimp, Executrix, etc., and by Mr. W. E. Church and Mr. Charles M. Sturges, counsel for appellees, and the court having heard the same, takes this matter under advisement.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE SEVENTH CIRCUIT.

No. 251. OCTOBER SESSION, 1895.

Eugenia Crimp, Executrix, etc., *vs.* McCormick Construction Company, *et al.*	Appeal from the Circuit Court of the United States, for the Northern District of Illinois, Northern Division.

Before WOODS, JENKINS and SHOWALTER, Circuit Judges.

This appeal depends upon the construction of a contract made July 24, 1892, between the McCormick Construction Company and R. P. McCormick, described together as the party of the first part, and W. G. Crimp, the second party. Broadly stated, the question is whether by force of that contract Crimp became an outright purchaser of stock, or only a creditor of the company, taking the stock as collateral. Soon after the making of the contract Crimp became sick, and in December following, died, and his widow, the appellant, having been appointed executrix of his last will brought in the court below a bill upon which she procured the appointment of a receiver and other proceedings whereby the property of the company and its contract with the Drainage District were sold, the sum of $8,000 being obtained for the property and $33,000 for the contract. In respect to the distribution ordered of the $8,000 there is no dispute. Of the amount received for the contract the net sum of $27,228.29 remained, of which distribution was ordered among intervening creditors to the exclusion of the appellant whose intestate was held to have been a purchaser of stock to the amount of $25,200 advanced under the contract, and not a creditor. The contract is of the tenor following:

"Whereas, The McCormick Construction Company, a corporation organized and existing under the laws of the State of Missouri, is the owner of a certain contract for excavating 6,000 lineal feet, known as Section Number Fourteen (14) of the Main Drainage Channel of the Chicago Drainage Ditch, said con-

tract having been entered into between the said McCormick Construction Company and the Sanitary District of Chicago, under date of July 12th, 1892. And by the terms of said contract it is provided that the said McCormick Construction Company shall excavate on said main drainage channel about 1,000,000 yards of solid rock at and for the price of seventy-three (73) cents per yard, about 210,000 yards of glacial drift at and for the price of twenty (20) cents per yard, and erect and build about 19,946 yards of rock wall at and for the price of two ($2) dollars per yard, for other and more specific details of which said work and the terms of said contract reference is had to the same; and

Whereas, said McCormick Construction Company has now, in pursuance of said contract, erected on said Section Number Fourteen (14) a large amount of machinery, engines, boilers, inclines, cables, tracks, siding, cars, buildings, etc., and is engaged in excavating and building said main drainage channel under the superintendence and direction of its president and general manager, R. P. McCormick, and

Whereas, said R. P. McCormick is the owner of 225 shares of the capital stock of said McCormick Construction Company, and

Whereas, W. G. Crimp, of 4445 Champlain avenue, Chicago, is desirous of becoming interested in the said McCormick Construction Company on the terms, conditions and stipulations as hereinafter provided.

Now, it is agreed between said McCormick Construction Company and R. P. McCormick, individually, hereafter called the party of the first part, and W. G. Crimp, hereafter called the party of the second part, as follows, to wit:

First: That in consideration of the sum of twenty-five thousand two hundred dollars, ($25,200) cash, paid to said McCormick Construction Company by said second party, there shall be at once assigned and issued to said second party one hundred and twenty-six (126) shares of the capital stock of the said McCormick Construction Company, now owned by R. P. McCormick, the par value thereof being two hundred dollars ($200) per share, full paid and non-assessable.

Second: That said second party shall be at once elected a director and vice-president of said company and shall enter and personally assist in operating and managing said company and its

business and affairs without salary, and may furnish a suitable representative in the office of said company as assistant in its management, and at the expense of said company as he may elect, such expense not to exceed the sum of one hundred dollars per month.

Third: That the personal expenses or outlays of the officers of said construction company shall be charged to such officers personally. The officers of said company shall receive no salary, but the said R. P. McCormick shall devote his entire time to and manage and personally direct the construction of said drainage channel, during the life of said contract, without charge other than the share of profit that shall accrue to him thereunder and as a shareholder in said construction company.

Fourth: That said second party shall be entitled to fifty per cent. of the net profit accruing to, and to be derived by said construction company on account of said work now being done, or to be done under its said contract with said sanitary district and the first party hereto hereby agrees and guarantees that the amount of such profit to become due and payable to said second party shall not be less than twenty-five thousand dollars ($25,000) not including the sum of twenty-five thousand two hundred dollars ($25,200) invested in the stock of said company under this agreement which said latter sum shall be returned to said second party prior to and before any division and distribution of the profits arising to said construction company, under said construction agreement, shall be made, on receipt by said second party of which share of the profit and the money advanced and to be advanced by said second party, second party shall reconvey to said McCormick two hundred and twenty-five (225) shares of the capital stock of said construction company herein mentioned.

Fifth: That as security for the guaranty of said twenty-five thousand dollars ($25,000) profit, in addition to the principal sum of twenty-five thousand two hundred dollars ($25,200) paid by said second party to said construction company under this agreement, there shall be delivered and assigned to said second party ninety-nine shares of the stock of said construction company of the par value of nineteen thousand eight hundred dollars ($19,800) owned by the said R. P. McCormick, which shall be held as collateral to this undertaking and as security for the guaranty of profits herein made by the first party.

Sixth: That there shall also be delivered, but not assigned,

to said second party the original contract existing between said construction company and the Sanitary District of Chicago, to be held by said second party in connection with the stock of said construction company here by agreed to be transferred and issued to said Crimp for the guaranty herein made and as security for any sums or sum other than above mentioned, that he may advance to said construction company, it being intended that said Crimp through his ownership and control of all said stock hereby provided to be transferred to him, shall control the said contract in the event of failure by first party to carry out this contract or breach of this contract by the first party, and it is further agreed that said contract shall not, nor shall any right, title or interest therein be at any time assigned by any of the persons signing this contract. The said contract always to remain the property of said construction company subject to the rights of said second party hereunder.

Seventh: That the said sum of twenty-five thousand two hundred dollars ($25,200) to be now advanced by said second party, shall be used by the first party in the payment and liquidation of the debts and liabilities of the McCormick Construction Company as set out in the sworn schedule of assets and liabilities hereto attached and made a part hereof except as hereto otherwise provided.

Eighth: That said second party shall advance to said construction company the further sum of seven thousand dollars ($7,000) to pay the item of that amount set out in the schedule to become due the North-Western National Bank. That when said indebtedness is paid by said second party, there shall be delivered to him seven promissory notes, executed by said construction company, each for the sum of one thousand dollars (1,000) and payable at intervals of forty (40) days from the date of the advance of the said sum of seven thousand dollars ($7,000) by said second party, the said notes to bear interest at the rate of seven (7) per cent. per annum from date.

Ninth: That the ninety-nine (99) shares of stock in said construction company to be assigned to said second party under paragraph fifth hereof and said contract mentioned in paragraph sixth hereof shall also stand and be held by said second party in like manner as security for the payment of the promissory notes of said construction company covering the advance of the seven thousand dollars ($7,000) aforesaid.

Tenth: That in case of the failure of the first party to carry out and faithfully perform all the agreements and undertakings hereunder, that the said ninety-nine (99) shares of stock of said construction company mentioned in paragraph fifth hereof, immediately upon such failure become the property of said second party as and for liquidated damages hereunder.

Eleventh: That on the completion of the work provided for in said contract and the receipt of said construction company of payment for the same, and in case of the faithful performance of this agreement and of all the undertakings hereunder by the first party hereto, and the repayment to said second party of the sum of twenty-five thousand two hundred dollars ($25,200), the amount originally advanced hereunder, and of the additional sum of one-half the profits, but not less than twenty-five thousand dollars ($25,000), as provided in said guaranty, and of the said sum of seven thousand dollars ($7,000) and interest as herein provided, then there shall be re-assigned and returned to said R. P. McCormick all of the shares of said stock of said construction company, hereinbefore provided to be issued to said second party and held by said second party in his own name or held by him as collateral, and said contract shall in such case be returned to said company and thereupon this contract shall be ended.

Twelfth: That at the completion, termination and fulfillment of this agreement in all its terms and conditions, all the shares of stock above mentioned, either held by said second party in his own name or as security for said guaranty, shall be transferred to said McCormick, but all of the increment and betterment of the assets of said company and all additions thereto made, subsequent to the date of this agreement, shall be the joint and equal property of the parties hereto, to be disposed of as they may agree.

This contract is signed in duplicate by the parties hereto, this 24th day of July, A. D. 1893.

McCORMICK CONSTRUCTION COMPANY,
By R. P. McCORMICK, Pres.
R. P. McCORMICK,
W. G. CRIMP."

Schedules attached to the contract showed total assets $70,028; total liabilities, $27,956, or net assets $42,072.

A few days later the following agreement was made:

"There being nothing expressed in the foregoing and attached contract, dated July 24th, 1893, and signed by R. P. McCormick and W. G. Crimp, expressing clearly upon what date accounts pertaining to the business covered by said contract shall commence and continue other than as set forth in the statement of assets and liabilities made a part of said contract, we hereby mutually agree on this tenth day of August, 1893, that the party of the first part pay all labor accounts to and including July 20th, 1893, and receive credit for the proportion of the estimate for July to and including July 20, 1893, less the reservation of 12½ per cent., which reservation is named as a part of the assets in the foregoing contract as signed by R. P. McCormick and W. G. Crimp and dated July 24, 1893, as above described.

R. P. McCormick, (Seal.)
W. G. Crimp. (Seal.)"

It was admitted before the master, as shown by his report, that Crimp was elected a director and vice-president of the construction company, and that he did enter and personally assist, for a time at least, in operating and managing said company and its business and affairs as provided in the second clause of said contract; that the drainage contract referred to in the foregoing contract, contained a provision which prohibited the original contractor from assigning it or sub-letting the work under penalty of forfeiture; and that there were no net profits. "It was neither admitted nor de-"nied, by counsel for the objecting creditors, that said Crimp had "paid the sums claimed, or any sums under the said contract, but "that question was left open for future determination if it should "become material."

Woods, *Circuit Judge*, after making the foregoing statement, delivered the opinion of the court:

The contention of the appellant is that her intestate loaned to the McCormick Construction Company the sum of $25,200 mentioned in the first article of the contract of July 24, 1893, and that the one hundred and twenty-six shares of capital stock of the company mentioned in that article, the ninety-nine shares mention in the fourth article and the drainage contract referred to in the fifth article were delivered to him in pledge to secure the repayment of the loan. If it can be assumed or deduced that a loan was intended, it follows, of course, that the 126 shares of stock mentioned in the first article of the agreement, and perhaps the 99 shares mentioned in the fifth article became a pledge or security for the repayment of the loan; but can that be said to have been

intended, or to be the necessary result, in respect to the drainage contract? The fourth article of the agreement contains a guaranty that Crimp's share of profits shall not be less than $25,000 "not including" the sum of $25,200 invested in the stock of the company, which latter sum, it is provided, shall be returned to him before any division of profits shall be made. The fifth article provides that as security for the guaranty of $25,000 profit, "in addition to the principal sum" of $25,200, there shall be delivered and assigned to the second party 99 shares of stock, "which shall be held as collateral to this undertaking and as security for the guaranty of profits herein made by the first party." "This undertaking," we suppose, means the entire contract, and includes all obligations thereby imposed upon the construction company and McCormick or either of them. The sixth article has special reference to the drainage contract, which, it is stipulated, shall be delivered but not assigned to Crimp, to be held in connection with the stock agreed to be transferred to him "for the guaranty herein made and as security for any sums or sum other than above mentioned that he may advance to said construction company," "it being intended" that through his ownership and control of all the stock to be transferred to him he shall control the said contract in the event of failure by the first party to perform the agreement. It is further stipulated that said contract shall not be assigned by any of the parties to the agreement, but shall always "remain the property of said construction company, subject to the rights of said second party hereunder." We incline to the view that it was not intended by this provision to make a pledge of the drainage contract for the performance of any obligation, and that the effect was simply to give to Crimp the possession and such control as to enable him to prevent any disposition of the instrument which might depreciate the stock, in which the security intended to be given him should consist. The last clause, "subject to the rights of said second party," does not expand to the dimensions of a pledge the right of mere physical possession which was made attendant upon the possession of the stock, which alone it was intended to pledge.

But if it be conceded that there was a pledge of the drainage contract, the next inquiry is, to secure the performance of what act or obligation was the pledge intended? The language used is: "To be held * * * in connection with the stock * * * transferred * * * for the guaranty herein made and as security for any sums or sum other than above mentioned." This seems to have been regarded by counsel on both sides as meaning that the stock referred to was pledged not only "as

security for the guaranty" of profit, according to the fifth article, but also as security for other sums, besides those before mentioned, which Crimp might advance, but grammatically it seems rather to mean that the contract is to be the security for the additional sums contemplated. The substance of the expression is that the contract is to be held in connection with the stock and as security for sums advanced other than those before mentioned. Upon this construction, the contract was a security for the sum of $2,983.34, alleged to have been advanced by Crimp over and above the stipulated sum of $25,200, but, as no objection is urged here against the decree in that particular, the matter is important only as it bears upon the construction of the agreement in respect to the questions in dispute.

If next it be conceded that the contract was pledged for all that the stock, in connection with which the contract was "to be held," was pledged, what is embraced in the security? By force of the fifth article of the agreement the 99 shares of stock are to be assigned as security for the guaranty of a profit not less than $25,000, "in addition to;" or, as it is expressed in the fourth article, "not including," the original sum of $25,200, which Crimp agreed to invest and which it was agreed should be returned to him before there should be any distribution of profits. That guaranty does not in terms nor by necessary implication embrace the agreement that the original loan or investment should be returned. The agreement is not, though it was probably the understanding or expectation, that that return should be made out of the profits of the drainage contract. It might be made out of other assets of the construction company if the scheme had been prosecuted with success. The construction company and McCormick, if the transaction was a loan, assumed two distinct obligations, first to repay the debt, and second, if the contract in that respect is binding upon the corporation, to make good to Crimp the stipulated profit; but the guaranty, for which the 99 shares of stock were pledged and for which the drainage contract is assumed to have been pledged, extends only to the latter obligation. The entire investment or loan is to be returned, it is true, before the counting of profits begins, but it does not follow that the guaranty that the profits shall not fall below a stated amount includes or is equivalent to a guaranty of the loan. It means no more than that earnings, or receipts, which otherwise might be counted as profits, shall be first used, if necessary, after exhausting other resources, to repay the investment, and whether there be enough, or more, or less than enough for that purpose, the guaranty is confined to the profits and does not include the whole or any part of the invest-

ment. But the appellant has made no claim for profits and as the 126 shares of stock, which upon the theory of a loan were pledged for repayment of the money, are worthless, the appellant's position, on this theory, was that of an unsecured creditor, entitled to share ratably with other creditors of the construction company in the proceeds of the sale of the drainage contract.

But we do not think that the theory of a loan is tenable. We are of opinion, on the contrary, that upon the face of the agreement, unaided by extraneous evidence, the advancement which Crimp undertook to make must be regarded as the price of 126 shares of stock purchased. The purchase was a conditional one; that is to say, it was upon an agreement to resell to the vendor, who bound himself to repurchase, at the original price, provided the other parts of the agreement were duly performed. When the question is whether a transaction was a conditional sale or a mortgage, the courts in doubtful cases lean to the conclusion that the reality was a mortgage and not a sale. *Russell* v. *Southard*, 12 How., 139. When extraneous evidence is heard the controlling inquiry is whether or not there was a debt, pre-existing or then created, for which the conveyance or transfer was intended to be a security. When, as here, the question is to be determined by the face of a writing, the rule has been declared that "where all the clauses of "an instrument are consistent with a conditional sale, but some "inconsistent with a mortgage, it will be construed as being the "former and not the latter." 1 *Hilliard*, Mortgages, 100, n. (a); *Chapman* v. *Turner*, 1 Call., 251. Without repeating or going into a further analysis of the terms of this agreement, we think the clear intention of the parties was a sale of the 126 shares of stock. Article one by itself can mean nothing else, and the other provisions and expressions of the agreement not only support the conclusion, but, in some respects, are irreconcilable with the theory of a loan—especially the provision of the twelfth article that after fulfillment of the agreement in all its terms and conditions, and a retransfer of all of the stock to McCormick, "all of the increment and betterment of the assets of said company and all additions thereto, made subsequent to the date of this agreement, shall be the joint and equal property of the parties hereto, to be disposed of as they may agree." Money advanced as the price of shares of stock in a company upon an agreement that it should be returned and the stock reassigned might be regarded as a loan, perhaps, notwithstanding stipulations that the lender should be made president and be guaranteed large profits—in lieu of interest, it might be, and of compensation for services—but such a right as this to share in the increment and betterments of the corporate property cannot pertain to a loan, and

is consistent only with the theory that Crimp intended, as in terms he explicitly agreed, to become a shareholder. Upon this point the tenth article of the agreement is of great and perhaps controlling significance. It provides that in case of the failure of the first party to perform the agreement in all its parts, the 99 shares of stock shall immediately upon such failure become the property of the second party as and for liquidated damages. No other remedy seems to have been contemplated, and in such case—such is the present case—perhaps no other can be invoked. To say the least if that remedy were asserted, the absolute ownership of the 225 shares of stock would become vested in the appellant as the representative of the second party, and the right of the company to retake possession of the drainage contract which could not be included in the forfeiture, would immediately revive.

The decree below is, therefore, affirmed.

MONDAY, January 6, 1896.

Court met pursuant to adjournment.

PRESENT:

Hon. William A. Woods, Circuit Judge,
Hon. James G. Jenkins, Circuit Judge,
Hon. John W. Showalter, Circuit Judge.

EUFENIA CRIMP, Executrix, etc., *Appellant*,
v. No. 251.
MCCORMICK CONSTRUCTION COMPANY, *et al.*

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This cause came on to be heard on the transcript of the record from the Circuit court of the United States for the Northern District of Illinois, and was argued by counsel.

On consideration whereof: It is now here ordered, adjudged and decreed by this court that the decree of the said Circuit court in this cause be and the same is hereby affirmed with costs.

Afterwards, to wit: on the fourth day of February, 1896, came the appellant in said entitled cause by her counsel, and filed in the office of the clerk of said court her petition for a rehearing.

IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT.

No. 251. JANUARY SESSION, 1896.

Eugenia Crimp, Executrix, etc.,
vs.
McCormick Construction Company, *et al.* } On Petition for Rehearing.

Before WOODS, JENKINS and SHOWALTER, Circuit Judges.

WOODS, *Circuit Judge:*

This petition in large part covers ground already considered, and to that extent requires no response. In so far as it goes beyond the original briefs and the argument at the hearing, it is characterized by inaccuracy of statement and by an uncalled for exhibition of temper. After quoting from our opinion the proposition that Crimp's purchase of stock was conditional, or upon an agreement to resell at the same price, the petition says: "Now let us see in "what sort of a hole this conclusion puts the court. We take the "court at its word. It is no use to say that there is not a sentence, "a line, a word, or a syllable of this contract that points to a con- "ditional sale of the stock, or of a sale with an agreement to re- "purchase at the same price or any other price. No matter for "this. The court wipes out the old contract and constructs a new "one. The proposition is, that McCormick sold his stock (126 "shares) to Crimp for $25,200, paid to the Construction Company "upon the condition that Crimp should sell it back to McCormick "at the same price, McCormick (not the Construction Company "that received the money) agreeing to re-purchase at that price, "provided the other parts of the agreement were duly performed. "That is, McCormick agreed to re-purchase, if he and the Con- "struction Company, who were together the first party to the con- "tract, did as they agreed to do. And if they did not perform the

"contract on their part, and, by their failure to perform, destroyed "the value of the stock, then McCormick would not be bound to "re-purchase. McCormick and the Construction Company did in "everything fail to perform, and utterly abandoned the execution "of the drainage contract, and, therefore, no obligation to re-pur-"chase the worthless stock or to refund the money to Mr. Crimp "rests upon anybody. . . . There are some things which the "members of the profession can bear patiently, treat respectfully, and "discuss with good temper, even though they may consider them "errors. Other things in the same line seem so unnatural, so lack-"ing in perceptions of justice and reason, that they stir up all the "bitterness of feeling which can find lodgment in the human "breast. Prudence would then dictate a suspension of comment. "We yield to the dictates of prudence. If the court adheres to "the conclusion announced in the last quotation from the opinion, "this petition must be denied. If it does not so adhere (and we "fail to see how it can) the petition must be granted, for the con-"clusion is the result of wrong methods and wrong reasoning, and "the whole case must be reconsidered by different methods and "upon different theories." This is Nestor playing the part of Thersites, though hampered somewhat, it seems, by a prudent regard for the sceptre of Ulysses.

But from the manner we turn to the matter of the petition. "A sale with an agreement to repurchase is usually termed a con-ditional sale." 1 Hilliard, Mortg. 96, and that this agreement was of that character is demonstrated by the first, fourth, eleventh and twelfth articles of the contract. The proviso that is supposed to have made the proposition worthy only of ridicule, if it relates at all to the undertaking of McCormick to repurchase, applies especially to the agreement of Crimp to resell. Only upon the condition of that proviso did he agree to re-assign the stock pur-chased, together with that pledged, and it is not difficult to perceive his motive for having the contract so framed. His belief manifestly was that the company would realize large profits, and if he had lived to give the business his personal attention, it is possible that his expectation would not have been disappointed; and in that event, it was his purpose, upon failure of the other parties to fulfill to the letter their promises and covenants, to have it in his power, if he should deem it to his interest, to refuse to re-assign, and, by forfeiting the ninety-nine shares which had been pledged, to become the owner of the entire capital stock and thereby the effectual owner of the entire property of the company. On the other hand, he could hardly have failed to understand that if McCormick and the Construction Company, by their failure to

perform the contract, should destroy the value of the stock, or that if for any reason the contemplated enterprise should prove disastrous, the company and McCormick would thereby be made insolvent, and their promise, or the promise of either of them, to re-purchase or to redeem the stock, would be worthless. The supposed incongruity between the agreement for a re-sale and re-purchase and the condition upon which its performance was made dependent is therefore more imaginary than real.

The court's view of the twelfth article of the contract is criticised. "In this part of the opinion," it is said, "the court forgets "that it was one of the early stipulations of the contract that the "profits to be made by the performance of the drainage contract "should be divided equally between the parties. . . . . If not other- "wise provided (and there is no other provision in the contract), "the cost of all improvements and additions to the plant or assets "of the company must necessarily be taken from that fund which "would otherwise go to increase the profits of the enterprise. All "such improvements and additions would therefore be invested "profits, and as Crimp's interest in and connection with the Con- "struction Company was to cease with the completion of the "drainage contract, his share in the profits thus invested would be "lost to him unless an interest in those improvements and additions "was preserved to him." This only emphasizes the significance given by the court to the twelfth article, which, unlike the fourth, is not limited to improvements and additions to the assets of the company derived from the proceeds of the drainage contract, but embraces all increment, betterment, and additions, from whatever source, accruing or made after the date of the contract. The business of the company was not limited to the performance of the drainage contract, and if other profitable business had been done, there is no possible construction of the contract in suit by which Crimp could reasonably have been denied the joint interest so unequivocally stipulated for in the last article of it.

The case was understood to be submitted to us as one which depended in the main on the construction of the contract, unaided by extrinsic evidence, and so we decided it, overlooking nothing though not specifically mentioning everything within the four corners of the writing; but now it is suggested that "both competent and necessary to be considered along with the papers signed by the parties are the facts and circumstances attending their execution and the situation of the parties themselves." If, however, the case is of a character to require or permit of such presentation, and if there is evidence in the record competent to be considered, outside

of the contract, that evidence was not referred to at the hearing and has not now been called to our attention. But it is said, also, that "the opinion does not utilize the definite facts appearing upon the face of the contract for the purpose of arriving at the probable and reasonable intention of the parties. We wish again, as briefly as possible, to call attention to those facts;" and here follow eight propositions, some of which accord with express terms of the contract, some are mere inferences, more or less probable, some are wholly unwarranted, and intermingled with them are subordinate suggestions and assumptions of which the contract contains no hint. For instances of the definite facts, it is stated that the construction company was seriously embarrassed for the want of ready money; that in this situation McCormick applied to Crimp, a stranger so far as the record shows, for assistance to enable the company to go on with the drainage contract, "and nothing more;" that the contract relates solely to the work to be done under the drainage contract, that the mere fact of Crimp's $25,200 having been advanced to the construction company imported an obligation on the part of the company to refund it; that the stock belonged to McCormick, and, however intimate his relations with the company, the two are distinct "and cannot be and must not be confounded;" that the drainage contract was the property of the construction company and not of McCormick, and that by the fourth and eleventh articles the $25,200 advanced are to be "repaid" or "returned." The contract, however, does not show that the company was not able readily to obtain from other sources needed money, nor that McCormick applied to Crimp, nor, even by suggestion, that they were strangers, but to the contrary expressly recites that Crimp was "desirous of becoming interested in the construction company" upon the terms and conditions mentioned. That the contract does not relate solely to the work to be done under the drainage contract is shown by the last article, as already explained, and though it is provided in terms in the eleventh article, that, upon the performance of the things there mentioned, "this contract shall be ended," it is evident that for the purposes of the twelfth article it would continue in force. And if presumptions are to be indulged, it is probable that the money paid by McCormick for stock went to the company, because McCormick had not paid therefor or was otherwise indebted to the company, and that thereby the shares became, as recited in the contract, "full-paid and non-assessable," and the requirement of the seventh article, that the money be applied in the particular way specified, was made reasonable, when it otherwise would not have been. It is not true in law, that the mere fact of Crimp's money having been advanced to the construction company, under the circumstances, im-

ported an obligation on the part of the company to refund it. But, as bearing upon the question of construction, the more important fact, evident upon the face of the contract, as it seems to us, is, that all the parties, and certainly Crimp, entered into the agreement anticipating large profits from the performance of the contract with the drainage district; and, if that had been the outcome, it may be assumed that Crimp would have insisted upon the construction which the court placed upon the contract, because it would have been more beneficial to him than any other. On the theory of a loan he could have claimed rightfully only the return of his money with lawful interest and perhaps reasonable compensation for his services. All besides would have been usurious. If the transaction was in fact a loan, the contract was, on Crimp's part, most unconscionably exacting, and there is no rule of construction or interpretation which requires the court, in order to fasten such a character upon a writing, to ignore any of its provisions, or to force upon them strained and unnatural definitions. As a shareholder in a speculative enterprise it was legitimate that Mr. Crimp should make large profits and take security for their realization; as a lender of money he was entitled only to lawful interest, for the payment of which and the repayment of the principal sum he was entitled to exact such security as he was willing to accept, but, as a good citizen, nothing more.

It is insisted in behalf of the appellant, that somehow or other a construction shall be invented or forced which will relieve from the disaster of a condition of affairs which was not apprehended, and against which no stipulation or security was provided, or, indeed, could well have been provided, in so far as it was the result of the alleged fraudulent conduct of McCormick, made possible, and perhaps suggested, by Crimp's physical inability to interfere. It is said further, that the contract "needs and must have construction and not simply interpretation in order that it may, if possible, be brought into line with the reasonable and probable intention of the parties to it. If this cannot be done, then it would be the duty of the court to pronounce the contract void for uncertainty, or fraudulent for its gross injustice, and to determine the rights of the parties independently of the jargon of words to which their signatures were appended." And yet it is by virtue and upon the assumed validity of the contract that the appellant sought relief and has whatever standing she has in court. Without it she has no pretense of a lien upon the drainage contract or the fund realized from its sale, and she has asserted no right not dependent upon it. Besides there is no issue in the case, nor proof, upon which the court could have considered whether the contract was for any rea-

son invalid or fraudulent, and if it be true, as asserted, that McCormick misappropriated, or converted to his own use, the money advanced by Crimp, and even if that was his intention from the beginning, it does not affect the question of the right interpretation or construction of the contract.

Finally it is said: "The trouble with the opinion of the "court is, that it is all the time sticking to the literal and technical "meaning of the words employed in some of the articles of the "contract. It does not try to bend that (meaning) into harmony "with a reasonable intention of the parties. The effort is all the "time to interpret and not to construe, to find inconsistencies, and "not to harmonize them, and in doing this it gives the widest and "most sweeping effect to words and clauses which seem to open "wide the door for successful rascality, and visits the consequences "of the iniquities of the Construction Company and McCormick "upon the victim of those iniquities in every possible way. The "126 shares of stock would be as much involved and as completely "liberated from the claims of Crimp and his representative, by "the forfeiture of the 99 shares under article 10, as would the "drainage contract. The theory of the opinion makes Crimp "agree, that if the construction company and McCormick fail to "perform their part of the contract, and thereby ruin the entire "enterprise, he will accept 99 shares of the stock made worthless "by their defaults, in full satisfaction of his money advances and "expected profits. As already said nothing short of inexorable "necessity should compel such a conclusion, and the hesitancy and "want of positiveness of the opinion, if nothing else, indicate that "no such necessity exists. As the 99 shares were transferred as "a security for profits mainly, it would be easy, other parts of the "contract considered, to limit the effect of their forfeiture to the "loss of the profits, and no rule of construction would be violated "by so doing. If the court will force upon the appellant the "ownership of these 99 shares by virtue of the provisions of article "10, and against her will, for the villainous conduct of McCormick "and his company, (which ought not to be done), we insist that "the consequences should extend no further than the most rigid "and limited construction of their rights absolutely requires." To all this the opinion itself and what we have already said here would be sufficient answer. The theory of the opinion, neither by construction or interpretation, can be made to bear the implication suggested. On the contrary the opinion says that, "if that remedy" —that is, the forfeiture of the ninety-nine shares—"were asserted, the absolute ownership of the 225 shares of stock would become vested in the appellant as the representative of the second party."

Upon the construction given by the court to the contract that is clearly so, because on that theory Crimp was already the owner of the 126 shares and by reason of the default of the other parties was released from the obligation to resell. And while "the right of the company to retake possession of the drainage contract, which could not be included in the forfeiture, would immediately revive," the beneficial ownership of that contract would follow the ownership of the stock, subject, of course, as on that theory it ought to be, to the payment of the debts of the company. The suggestion, in the first lines of this last quotation, that the court ought "to bend" the meaning of the words employed in some of the articles of the contract "into harmony with a reasonable intention of the partis" is a begging of the question. The "reasonable intention" is to be sought, not assumed, and the intention contended for cannot be found in "the literal and technical meaning of the words employed" in any of the articles of the contract. It might, perhaps, by construction, be deduced from some of the articles, but not from the entire contract without ignoring or forcing from their true significance the plain and unequivocal words and expressions of other articles. The court's construction puts upon no word, phrase, sentence or article a strained or unfamiliar sense. Upon that construction every provision of the contract was upon its face favorable to the appellant's testator, and if in the outcome there has been misfortune or injustice, it is attributable to causes outside of the contract, against which no safeguard was devised, or perhaps thought to be necessary.

The petition is overruled.

THURSDAY, March 5, 1896.

Court met pursuant to adjournment.
Present:

Hon. William A. Woods, Circuit Judge,
Hon. James C. Jenkins, Circuit Judge,
Hon. John W. Showalter, Circuit Judge.

Eugenia Crimp, Executrix, etc.,
vs.
McCormick Construction Company
et al.
} *No. 251.*

It is ordered by the court that the petition for rehearing in this cause be and the same is hereby denied.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

I, OLIVER T. MORTON, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 210, inclusive, contain a true copy of the record and proceedings in the United States Circuit Court of Appeals for the Seventh Circuit in the case of EUGENIA CRIMP, Executrix, etc., vs. MCCORMICK CONSTRUCTION COMPANY et al., No. 251, October term, 1895, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and fix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 18th day of March, A. D. 1896.

OLIVER T. MORTON,
[SEAL.] *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

Office Supreme Court, U. S.
FILED.
APR 2 1896
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1895.

No. 955

EUGENIA CRIMP, EXECUTRIX, ETC.,
Appellant,

vs.

McCORMICK CONSTRUCTION COMPANY ET AL.,
Appellees.

PETITION of EUGENIA CRIMP, Executrix, &c , for a Writ of *Certiorari* to the United States Circuit Court of Appeals, for the Seventh Circuit.

JOHN N. JEWETT,
Solicitor and of Counsel for Petitioner.

BARNARD & MILLER, PRINTERS, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1895.

No. 251.

Petition for Writ of *Certiorari*, requiring the Circuit Court of Appeals, for the Seventh Circuit, to certify to the Supreme Court for its review and determination the Case of

EUGENIA CRIMP, Executrix, &c., *Appellant,*

vs.

McCORMICK CONSTRUCTION COMPANY et al., *Appellees.*

To the Honorable, the Supreme Court of the United States:

Your petitioner, Eugenia Crimp, executrix of the last will and testamentof William G. Crimp, late of the county of Cook, in the State of Illinois, deceased, who is a resident and citizen of said State of Illinois, respectfully represents and shows unto this Honorable Court, that lately and at the October term, A. D. 1895, of the United States Circuit Court of Appeals in and for the Seventh Judicial Circuit, to wit: on the 6th day of January, A. D. 1896, in a cause in equity then pending in said court, on appeal from the Circuit court of the United States for the Northern District of Illinois, (Northern Division) wherein your petitioner was appellant, and the McCormick Construction Company, a corporation and citizen of the State of Missouri, and R. P. McCormick, then and

now a citizen of the said State of Missouri, and others who were and are citizens of states other than the State of Illinois, were appellees, the said United States Circuit Court of Appeals by its order and judgment, duly entered of record, affirmed the orders and decree of the said Circuit court, which had been adverse to the interests and claims of your petitioner, and afterwards, to wit: on the 5th day of March, A. D. 1896, by an order also entered of record in said cause, denied a petition for rehearing duly presented and filed by your petitioner therein, according to the rules and practice of said court; and your petitioner is advised that, under the law in such case made and provided, your petitioner is unable, either by appeal or writ of error, to cause the record, proceedings and judgment of the said Circuit Court of Appeals in said cause to be brought into the Supreme Court of the United States for re-examination and review by said court.

Your petitioner further represents and shows unto your Honors that she is advised by counsel, and verily believes, and therefore states it to be true, that the principal and only matter of controversy submitted to and considered by the said Circuit Court of Appeals, in said cause, related to the construction to be given to a certain agreement made and entered into in the life-time of said William G. Crimp, to wit: on or about the 24th day of July, A. D. 1893, by and between the said McCormick Construction Company and R. P. McCormick, as party of the first part, and William G. Crimp, your petitioner's testator, as party of the second part, a copy of which is hereto attached, marked Exhibit A, and is made a part of this petition, which said question the said Circuit Court of Appeals decided and determined adversely to the rights, interests and claims of your petitioner, thereby,

as your petitioner states and insists, depriving her of her right to have and recover as a preferred creditor out of the assets and effects of the said McCormick Construction Company, in the hands and possession of the receiver for said company, duly appointed in said cause by the said Circuit court of the United States for the district aforesaid, the sum of $25,200, owing to your petitioner as executrix, as aforesaid, by said McCormick Construction Company and said R. P. McCormick, or, as to said $25,200, to share *pro rata* or otherwise in said assets and effects in the control of said Circuit court, through its receiver, with the other creditors of said McCormick Construction Company, in the distribution of the proceeds of said assets and effects.

Your petitioner further represents and shows that the said McCormick Construction Company and the said R. P. McCormick are, as she is informed and believes, and charges to be true, wholly insolvent, and that no portion of said sum of $25,200 can be collected from them or either of them, by proceedings at law or otherwise, and that the assets and effects of the said construction company and the proceeds thereof in the hands of the receiver aforesaid, upon which your petitioner, under the agreement aforesaid, claims a special and prior lien, constitutes the only property or fund out of which your petitioner can expect to recover the said sum of $25,200, owing to her by said construction company and R. P. McCormick, or any part thereof.

Your petitioner further represents and shows unto your Honors, that her claim in and before the said Circuit Court of Appeals, distinctly made and urged, was that under and by virtue of the terms and provisions of the said agreement, set out in Exhibit A aforesaid, and espe-

cially by article VI thereof, the said William G. Crimp, in his lifetime, and your petitioner, as his executrix after his decease, acquired and held a lien paramount to the claims of all other creditors of the McCormick Construction Company, upon the contract of the said company with the Sanitary District of Chicago, referred to in said article VI of said agreement, and upon the proceeds of the sale thereof, the order of the Circuit court authorizing the sale of said contract and other assets specially providing, that the money arising from such sale should stand in the place of such property and assets, as is shown by the certified copy of the record and proceedings in said cause in said United States Circuit Court of Appeals, herewith presented and filed as a part of this application.

Your petitioner further represents and shows that by the judgment of the said United States Circuit Court of Appeals in said cause affirming the several orders and decree of the said Circuit court, it was decided and determined in substance and effect : First, that the said William G. Crimp, under and by virtue of the agreement of July 24, 1893, set out in Exhibit A, hereto appended, became in the full sense a stockholder in the McCormick Construction Company, and that such was the intention of the parties to said contract. Second, that the said agreement and the provisions thereof was ineffectual to create in favor of said Crimp a pledge of the drainage contract as a security for the payment of the said sum of $25,200, primarily advanced by him to said McCormick Construction Company, or any part thereof, or for the payment of any other sum or sums of money advanced by him to said construction company, and, third, that as to said sum of $25,200, your petitioner was not entitled to

share as a creditor in the assets of said corporation ; in each and all of which particulars, as your petitioner is advised by counsel and verily believes the judgment of said Circuit Court of Appeals is erroneous and wholly adverse to the rights and interests of your petitioner.

Your petitioner further represents and charges that the said Circuit Court of Appeals, in the decision of said cause, erred in overruling each and every of the errors assigned by your petitioner to the orders and decree of the said Circuit court in said cause, as shown and set forth in the transcript of the record and proceedings in said cause, herewith presented and filed, at pages 143, 144 and 145.

Your petitioner, the premises considered, therefore prays that a writ of certiorari may be issued out of and under the seal of this honorable court, directed to the said United States Circuit Court of Appeals for the Seventh Judicial circuit, commanding the said court to certify and send to this court on a day certain to be therein designated a full and complete transcript of the record and proceedings of the said Circuit Court of Appeals in the said case, therein entitled: *Eugenia Crimp, Executrix, etc.*, Appellant, v. *McCormick Construction Company, et al.* Appellees, No. 251, to the end that the said case may be reviewed and determined by this court as provided in Section 6 of the Act of Congress, entitled "An Act to establish Circuit Courts of Appeal, "and to define and regulate, in certain cases, the juris- "diction of the courts of the United States and for "other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with said act, and that the

said judgment of the said Circuit Court of Appeals in the said case may be reversed by this honorable court, and your petitioner will ever pray, etc.

EUGENIA CRIMP,
Executrix of the last Will and Testament of W. G. Crimp, deceased.

JOHN N. JEWETT,
Of Counsel.

UNITED STATES OF AMERICA,
STATE OF ILLINOIS,
COUNTY OF COOK. } ss.

EUGENIA CRIMP, being first duly sworn, deposes and says that she, as executrix of the last will and testament of William G. Crimp, deceased, is the petitioner in the above and foregoing petition named, and the same person who subscribed said petition; that the said petition has been read by her and she knows the contents thereof, and that the facts therein stated are true to the best of her knowledge, information and belief.

EUGENIA CRIMP.

Subscribed and sworn to before me, a notary public in and for the county of Cook and State of Illinois, this 31st day of March, A. D. 1896. Witness my hand and notarial seal the day and year aforesaid.

Seal

Signed Samuel T Jacobs
Notary Public

EXHIBIT A.

Whereas, the McCormick Construction Company, a corporation organized and existing under the laws of the State of Missouri, is the owner of a certain contract for excavating 6,000 lineal feet, known as section number fourteen (14) *of the* of the Main Drainage Channel of the Chicago Drainage Ditch, said contract having been entered into between the said McCormick Construction Company and Sanitary District of Chicago, under date of July 12, 1892. And by the terms of said contract it is provided that the said McCormick Construction Company shall excavate on said main drainage channel about 1,000,000 yards of solid rock at and for the price of seventy-three (73) cents per yard, about 210,000 yards of glacial drift at and for the price of twenty (20) cents per yard, and erect and build about 19,946 yards of rock wall at and for the price of two (2) dollars per yard, for other and more specific details of which said work and the terms of said contract reference is had to the same; and

Whereas, said McCormick Construction Company has now, in pursuance of said contract, erected on said section number fourteen (14) a large amount of machinery, engines, boilers, inclines, cables, tracks, sidings, cars, buildings, etc., and is engaged in excavating and building said Main Drainage Channel, under the superintendence and direction of its president and general manager, R. P. McCormick, and

Whereas, said R. P. McCormick is the owner of 225 shares of the capital stock of said McCormick Construction Company, and

Whereas, W. G. Crimp, of 4445 Champlain avenue,

Chicago, is desirous of becoming interested in the said McCormick Construction Company on the terms, conditions and stipulations as hereinafter provided.

Now it is agreed between said McCormick Construction Company and R. P. McCormick, individually, hereafter called the party of the first part, and W. G. Crimp, hereafter called the party of the second part, as follows, to wit:

First. That in consideration of the sum of twenty-five thousand, two hundred dollars ($25,200) cash, paid to said McCormick Construction Company by said second party, there shall be at once assigned and issued to said second party one hundred and twenty-six (126) shares of the capital stock of the said McCormick Construction Company, now owned by R. P. McCormick, the par value thereof being two hundred dollars ($200) per share, full paid and non-assessable.

Second. That said second party shall be at once elected a director and vice-president of said company, and shall enter and personally assist in operating and managing said company and its business and affairs without salary, and may furnish a suitable representative in the office of said company as assistant in its management, and at the expense of said company, as he may elect, such expense not to exceed the sum of one hundred dollars ($100) per month.

Third. That the personal expenses or outlays of the officers of said Construction Company shall be charged to such officers personally. The officers of said company shall receive no salaries, but the said R. P. McCormick shall devote his entire time to and manage and personally direct the construction of said drainage channel during

the life of said contract, without charge other than the share of the profit that shall accrue to him hereunder, and as a shareholder in said Construction Company.

Fourth. The said second party shall be entitled to fifty per cent. of the net profit accruing to, and to be derived by said Construction Company on account of said work now being done, or to be done, under its said contract with said Sanitary District; and the first party hereto hereby agrees and guarantees that the amount of such profit to become due and payable to said second party shall not be less than twenty-five thousand dollars ($25,000), not including the sum of twenty-five thousand two hundred dollars ($25,200) invested in the stock of said company under this agreement, which said latter sum shall be returned to said second party prior to and before any division and distribution of the profits arising to said Construction Company, under said construction agreement, shall be made. On receipt by second party of which share of the profit and the money advanced and to be advanced by second party, second party shall reconvey to said McCormick two hundred and twenty-five (225) shares of the capital stock of said Construction Company herein mentioned.

Fifth. That as security for the guaranty of said twenty-five thousand dollars ($25,000) profit, in addition to the principal sum of twenty-five thousand two hundred dollars ($25,200) paid by said second party to said Construction Company under this agreement, there shall be delivered and assigned to said second party ninety-nine shares of the stock of said Construction Company, of the par value of nineteen thousand eight hundred dollars ($19,800) owned by said R. P. McCormick, which shall

be held as collateral to this undertaking, and as security for the guaranty of profits herein made by the first party.

Sixth. That there shall also be delivered, but not assigned to said second party the original contract, existing between said construction company and the Sanitary District of Chicago, to be held by said second party in connection with the stock of said construction company hereby agreed to be transferred and issued to said Crimp for the guaranty herein made, and as security for any sums or sum other than above mentioned, that he may advance to said construction company; it being intended that said Crimp, through his ownership and control of all said stock hereby provided to be transferred to him, shall control the said contract in the event of failure by first party to carry out this contract or breach of this contract by the first party, and it is further agreed that said contract shall not, nor shall any right, title or interest therein, be at any time assigned by any of the persons signing this contract. The said contract always to remain the property of said construction company, subject to the rights of said second party hereunder.

Seventh. That the said sum of twenty-five thousand two hundred dollars ($25,200) to be now advanced by said second party, shall be used by the first party in the payment and liquidation of the debts and liabilities of the McCormick Construction Company, as set out in the sworn schedule of assets and liabilities hereto attached and made a part hereof, except as herein otherwise provided.

Eighth. That said second partyshall advance to said construction company the further sum of seven thousand dollars ($7000) to pay the item of that amount set out

n the schedule to become due the Northwestern National Bank. That when said indebtedness is paid by said second party there shall be delivered to him seven promissory notes, executed by said construction company, each for the sum of one thousand dollars ($1000), and payable at intervals of forty (40) days from the date of the advance of the said sum of seven thousand dollars ($7000) by said second party ; the said notes to bear interest at the rate of seven (7) per cent. per annum from date.

Ninth. That the ninety-nine (99) shares of stock in said construction company to be assigned to said second party under paragraph fifth hereof, and the said contract mentioned in paragraph six hereof shall also stand and be held by said second party in like manner as security for the payment of the promissory notes of said construction company, covering the advance of the seven thousand dollars ($7000) aforesaid.

Tenth. That in case of the failure of the first party to carry out and faithfully perform all the agreements and undertakings hereunder, that the said ninety-nine (99) shares of stock of said construction company mentioned in paragraph fifth hereof, immediately upon such failure *shall* become the property of said second party as and for liquidated damages hereunder.

Eleventh. That on the completion of the work provided for in said contract and the receipt of said construction company of payment for the same, and in case of the faithful performance of this agreement and of all the undertakings hereunder by the first party hereto, and the repayment to said second party of the sum of twenty-five thousand two hundred dollars ($25,200), the amount originally advanced hereunder, and of the additional sum

of one-half the profits, but not less than twenty-five thousand dollars ($25,000), as provided in said guaranty, and of the said sum of seven thousand dollars ($7,000) and interest as herein provided, then there shall be reassigned and returned to R. P. McCormick all of the shares of said stock of said construction company hereinbefore provided to be issued to said second party and held by second party in his own name or held by him as collateral, and said contract shall in such case be returned to said company, and thereupon this contract shall be ended.

Twelfth. That at the completion, termination and fulfillment of this agreement in all its terms and conditions, all the shares of stock above mentioned, either held by said second party in his own name or as security for said guaranty, shall be transferred to said McCormick, but all of the increment and betterment of the assets of said company, and all addition thereto made subsequent to the date of this agreement shall be the joint and equal property of the parties hereto to be disposed of as they may agree.

This contract is signed in duplicate by the parties hereto this 24th day of July, A. D. 1893.

McCORMICK CONSTRUCTION CO.,
By R. P. McCORMICK, *Pres.*,
R. P. McCORMICK,
W. G. CRIMP.

ASSETS AND LIABILITIES McCORMICK CONSTRUCTION CO.

JULY 20, 1893.

ASSETS.

Northwestern National Bank	$ 720
Reservation on contract	5,250
Inventory on property	54,058
New machinery and plant	11,000
Buildings	4,000
Inclines	1,500
Cable towers and fittings	3,000
Construction	5,000
Contract—cost and expense	9,000
Commissary stock	1,500
Camp outfit for buildings	2,000
Cars, track, etc	2,000
Miscellaneous fittings for machinery, with steam hose, etc	1,000
Total assets	$70,028

LIABILITIES.

Bills due July 1, 1893:	
Parker, Melcher & Ingraham	$ 8,500
Repanno Chemical Co	2,950
Miscellaneous bills	1,820
Bills for July, etc.:	
Account dynamite—not rendered	500
Rails ordered—not received	474
Miscellaneous bills	904
Bills payable outstanding:	
Northwestern National Bank, due Aug. 10	7,000
Ryan & McGurney	2,000
Am. Forcite Pow. Mfg. Co., Sept. 19th	1,703
M. P. Johnson Mchy. Co., Oct. 2d	1,730
Thos. P. Conrad, Sept. 16th	150
Thos. Ostler, Oct. 1st	225
Total liabilities	$27,956
Total assets	70,028
Total liabilities	27,956
Net assets	$42,072

STATE OF ILLINOIS, }
COUNTY OF COOK, } ss.

I, R. P. McCormick, president of the McCormick Construction Company, being first duly sworn, do on oath state that the above written statement of assets and liabilities of the McCormick Construction Company includes all of the assets and liabilities of the said company up to and including the date of July 20, 1893, as the same appear on the books of said company, and that the said list includes all of the liabilities of said company at the date aforesaid.

R. P. MCCORMICK,
President.

Subscribed and sworn to before me this 24th day of July, A. D. 1893.

JOHN S. HUMMER,
[SEAL.] *Notary Public.*

There being nothing expressed in the foregoing and attached contract, dated July 24, 1893, and signed by R. P. McCormick and W. G. Crimp, expressing clearly from what date accounts pertaining to the business covered by said contract shall commence and continue other than as set forth in the statement of assets and liabilities made a part of said contract, we hereby mutually agree on this 10th day of August, 1893, that the party of the first part pay all labor accounts to and including July 20, 1893, and receive credit for the proportion of the estimate for July to and including July 20, 1893, less the reservation of twelve and one-half per cent., which reservation is named as a part of the assets in the foregoing contract as signed by R. P. McCormick and W. G. Crimp, and dated July 24, 1893, as above described.

R. P. MCCORMICK, [SEAL.]
W. G. CRIMP. [SEAL.]

IN THE SUPREME COURT OF THE UNITED STATES, OF THE OCTOBER TERM, A. D. 1895.

EUGENIA CRIMP, *Executrix, etc., Appellant,*
vs.
MCCORMICK CONSTRUCTION COMPANY, R. P. MCCORMICK *et al., Appellees.*
No. 251.

To Marcus Kavanaugh, Solicitor for Patrick J. Sexton, Receiver, W. D. Washburn, Solicitor for the McCormick Construction Company and R. P. McCormick, Wm. J. English, Solicitor for Ingersoll-Sergeant Drill Company, and W. E. Church, Frank S. Weigley, Charles M. Sturges, Loren C. Collins, Adams A. Goodrich, Clarence S. Darrow, William A. Vincent, John H. Hamline, A. Barton Stratton and Charles S. Thornton, Solicitors for all other appellees in above entitled cause:

Please take notice that on Monday, the day of April, A. D. 1896, at the opening of court on that day, or as soon thereafter as counsel can be heard, the petition of which the above and foregoing is a copy, will be submitted to the Supreme court of the United States, for the decision of the said court thereon.

JOHN N. JEWETT,
Solicitor and of Counsel for Eugenia Crimp, Executrix, etc., Appellant.

Due service of the above and foregoing is admitted by us this day of , A. D. 1896.